



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

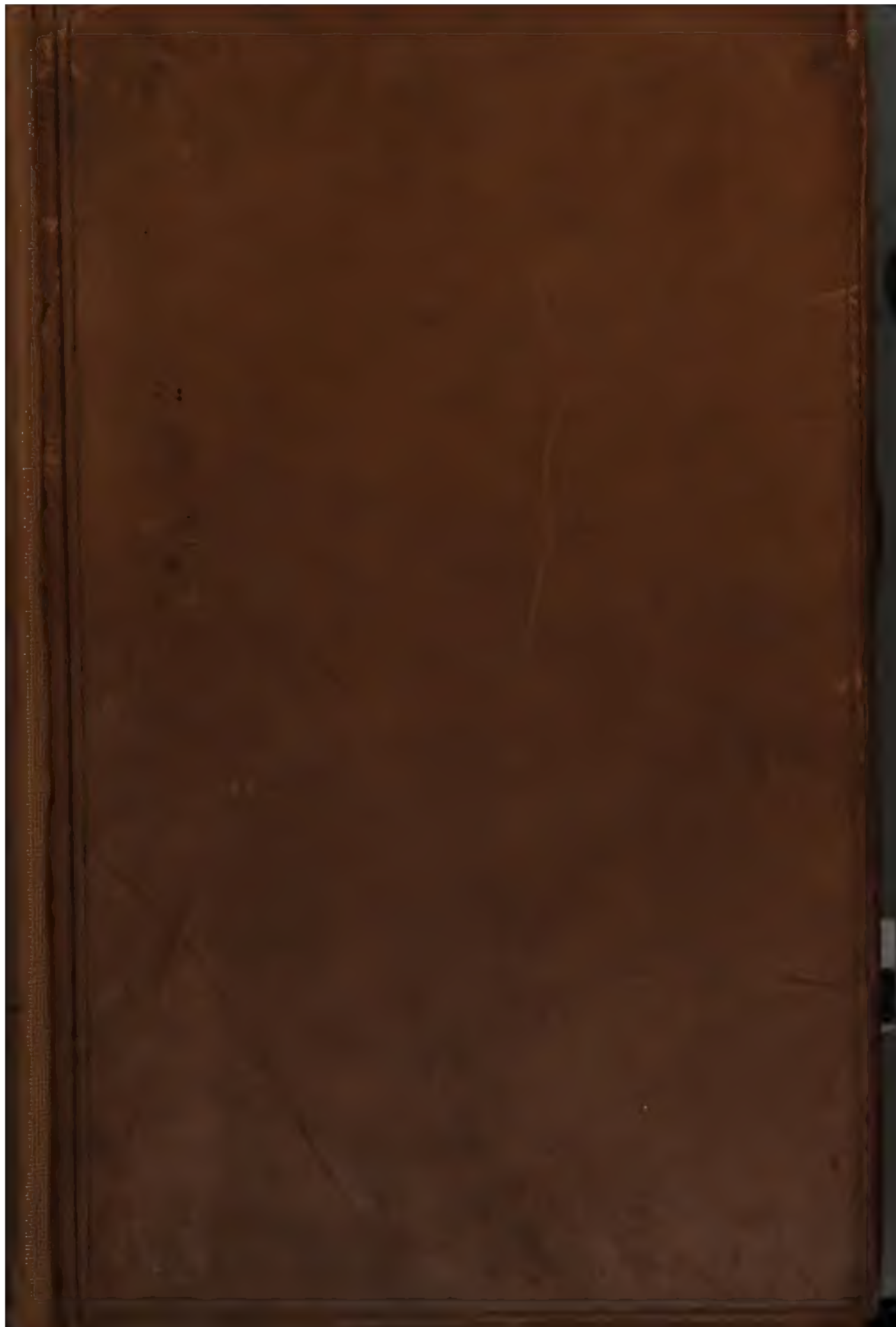
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L. Eng. h. 75. d. 286

L.L

GW.U.K:

100

P. 65.





R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN
THE HIGH COURT OF CHANCERY.
VOL. I.

LONDON :
SPOTTISWOODE and SHAW,
New-Street-Square.

R E P O R T S

OF

CASES

ARGUED AND DETERMINED

IN

THE HIGH COURT OF CHANCERY

DURING THE TIME OF

LORD CHANCELLOR LYNDHURST,

WITH A FEW DURING THE TIME OF

LORD CHANCELLOR COTTENHAM.

BY

T. J. PHILLIPS, ESQ.

BARRISTER-AT-LAW.

VOL. I.

1841—1847.

LONDON:

WILLIAM BENNING AND CO., LAW BOOKSELLERS,

43. FLEET STREET.

1847.



Lord COTTENHAM,	}	<i>Lord Chancellors.</i>
Lord LYNTHURST,		
Lord COTTENHAM,		

Lord LANGDALE, *Master of the Rolls.*

Sir LANCELOT SHADWELL,	}	<i>Vice-Chancellors.</i>
Sir JAMES LEWIS KNIGHT BRUCE,		
Sir JAMES WIGRAM,		

Sir JOHN CAMPBELL,	}	<i>Attorneys-General.</i>
Sir THOMAS WILDE,		
Sir FREDERICK POLLOCK,		
Sir WILLIAM FOLLETT,		
Sir FREDERICK THESIGER,		
Sir JOHN JERVIS,		

Sir THOMAS WILDE,	}	<i>Solicitors-General.</i>
Sir WILLIAM FOLLETT,		
Sir FREDERICK THESIGER,		
Sir FITZROY KELLY,		
Sir DAVID DUNDAS,		

ERRATA.

- Page 36. line 7, for “ *September* ” read “ *March*.”
129. line 4, dele “ with costs.”
248. note (c), for “ *B.* ” read “ *I.* ”
333. note (b), for “ 677,” “ read “ 377.”
371. note (a), after *Marshall*, for “ 3 *M. & C.* ” read “ 1 *M. & C.* ”
521. line 13 of marginal note, for “ the matter to which the suit relates ”
read “ the suit.”
621. last line, for “ allowed ” read “ overruled.”
622. first line, for “ Plaintiffs ” read “ Defendants.”
650. line 7 from bottom of marginal note dele “ chief.”

A

TABLE

OF

THE NAMES OF CASES

REPORTED IN THIS VOLUME.

A		Page		Page
			Bariatinski In re Princess	375
			Barrs v. Jackson	582
Allen v. Macpherson	133		Barton, Lane v.	363
Alston, Mozley v.	790		Beattie v. Johnstone	17
Amyot, Ex parte	130. n.		Beaufort, The Duke of,	
Anderson v. Wallis	202		Smith v.	209
Andrews v. Walton	619		Besch v. Frolich	172
Apperly v. Page	779		Birchall, Bampton v.	568
Appleby v. Duke	272		Bishopp, Davenport v.	698
Ardouin, Zulueta v.	368		Blundell v. Gladstone	279
Arnold v. Arnold	805		Bond, Stanley v.	103
Astley, Bulwer v.	422		Bovill, Attorney-General v.	762
Attorney-General v. Bovill	762		Brown v. Bamford	620
----- Canterbury			Brownrigg, Campbell v.	301
(Viscount) v.	306		Bruin v. Knott	572
----- v. The Earl			Buck v. Shippam	694
of Stamford	737		Buck, Vaughan v.	75
----- v. Potter	492		Bulwer v. Astley	422
----- v. Rickards	383		Bute, Marquis of, v. Glamor-	
			ganshire Canal Company	681
B				
Baddeley, Holmes v.	476			
Baggett v. Meux	627			
Baldock, Moss v.	118			
Ball, Hodson v.	177			
Bamford, Brown v.	620			
Bampton v. Birchall	568			
			C	
			Calvert v. Gandy	518
			Campbell v. Brownrigg	301
			Canterbury (Viscount) v. At-	
			torney-General	306

	Page		
Carpmael v. Powis	687	G	
Cass v. Cass	508		Page
Christ's Hospital v. Grainger	634	Gaitskell, In the Matter of	576
Clark v. Clark	116	Gandy, Calvert v.	518
Clarke and Others, In the		Garcías v. Ricardo	498
Matter of	562	Gaugain, Whitworth v.	728
Clarke v. Wilmot	276	Geddes, Jones v.	724
Clegg, Kershaw v.	120	Gillbee v. Gillbee	121
Clobery, Herring v.	91	Gilmore, Fulton v.	522
Cobbett, Oldfield v.	557. 613	Gladstone, Blundell v.	279
Colston, Quarrier v.	147	Gladstone, Walsh v.	290. 294
Cooper v. Emery	388	Glamorganshire Canal Com-	
		pany, Marquis of Bute v.	681
D		Gloucester, Corporation of,	
Dalton v. Hayter	515	v. Wood and Others	498
Daniel v. Dudley	1	Grainger, Christ's Hospital v.	634
Davenport v. Bishopp	698	Grant, Heighington v.	600
— v. Davenport	124		
Davies v. Lowndes	328		
Day and Others, Sharp v.	771	H	
Dudley, Daniel v.	1		
Duke, Appleby v.	272	Harborough, Lord, v. Wart-	
Dyce Sombre, In re	436	naby	364
Dykes, Tolson v.	439	Hayter, Dalton v.	515
		Heighington v. Grant	600
E		Henley, Smith v.	391
East India Company, Smith		Herring v. Clobery	91
v.	50	Hertfort, Ex parte, Marquis	
Edwards v. Jones	501	of	129
Emery v. Cooper	388	—, In the Matter of	
Evors, Lancaster v.	349	the Marquis of	203
Eyre, Ex parte	227	Hill, Foley v.	399
		Hills v. Nash	594
F		Hinton v. Lewis	459
Ferrers, Earl, Shirley v.	167	Hodson v. Ball	177
Fletcher, Walker v.	115	Holcombe, Lautour v.	262
Foley v. Hill	399	Holland, In re	379
Forbes v. Peacock	717	Holmes v. Baddeley	476
Foster v. Smith	629		
Fowler v. James	803	I	
Frolich, Besch v.	172		
Fulton v. Gilmore	522	Innes v. Mitchell	710

TABLE OF CASES REPORTED.

ix

		Page			Page
J					
Jackson, Barrs v.	582		Marshall, Ex parte		560
James, Fowler v.	803		Masters' Clerks, Case of		650
Jenkyns M'Fadden v.	153		Mattingley, Thorpe v.	200.	443
Johnstone, Beattie v.	17		M'Dermott v. Kealy		267
Jones, Edwards v.	501		Meek v. Kettlewell		342
Jones v. Geddes	724		Meux, Baggett v.		627
——, In the Matter of	461		M'Fadden v. Jenkyns		153
—— v. Pugh	96		Mitchell, Innes v.		710
—— Rouse v.	462		Mitford v. Reynolds	185.	706
—— v. Segueira	82		Morrall v. Sutton		533
—— v. Smith	244		Moss v. Baldock		118
			Mozley v. Alston		790
			Murray v. Vipart		521
K			N		
Kealy, M'Dermott v.	267		Nash, Hills v.		594
Kershaw v. Clegg	120		Needham v. Needham		640
Kettlewell, Meek v.	342		Nickels' Patent, In re		36
King's Grammar School, In			North, Price v.		85
the Matter of the	564				
Knott, Bruin v.	572		O		
			Oldfield v. Cobbett	557.	613
L			Oliver v. Latham	163.	408
Labertouche, Panton v.	265				
Lambirth, Wood v.	8		P		
Lancaster v. Evors	349		Page, Apperly v.		779
Lane v. Barton	363		Panton v. Labertouche		265
Latham, Oliver v.	163. 408		Parker v. Marchant		356
Lautour v. Holcombe	262		Pascall v. Scott		110
Lewis, Hinton v.	459		Pawlett, Ex parte, Lord Wil-		
Lloyd v. Wait	61		liam		570
Lockey, In the Matter of	509		Peacock, Forbes v.		717
Lowndes, Davies v.	328		Plummer, In re		56
			Potter, Attorney-General v.		492
M			Powis, Carpmael v.		687
Macpherson, Allen v.	133		Price, Malins v.		590
Malins v. Price	590		—— v. North		85
Mann v. Ricketts	530. 617		Pugh, Jones v.		96
Marchant, Parker v.	356				
——, Roberts v.	370		Q		
			Quarrier v. Colston		147

TABLE OF CASES REPORTED.

		Page			Page
R					
			Thomas, In re		159
			Thorold, In re		289
Renneck, Woodcock v.	72		Thorpe v. Mattingley	200.	443
Reynolds, Mitford v.	185.	706	Tolson v. Dykes		439
Ricardo, Garcias v.		498	Townshend, In the Matter		
Rickards, Attorney-General			of		804
v.		383			
Ricketts, Mann v.	530.	617			
Rivers, Lord, Rundell v.		88	V		
Roberts v. Marchant		370			
Rouse v. Jones		462	Van Sandau, Ex parte	445.	605
Rundell v. Lord Rivers		88	Vaughan v. Buck		75
—— Taylor v.		222	Vernon v. Thellusson		466
			Vipart, Murray v.		521
S					
Scott, Pascall v.		110	W		
Segueira, Jones v.		82			
Sharp v. Day and Others		771	Wainewright, In re		258
Sheffield Canal Company v.			Wait, Lloyd v.		61
Sheffield and Rotherham			Walker v. Fletcher		115
Railway Company		484	Wallis, Anderson v.		202
Shippam, Buck v.		694	Walsh v. Gladstone	290.	294
Shipwith, Westfield v.		277	Walton, Andrews v.		619
Shirley v. Earl Ferrers		167	Wartnaby, Lord Har-		
Smith v. East India Company		50	borough v.		364
—— Foster v.		629	Warwick Charities, In the		
—— v. Henley		391	Matter of		559
—— Jones v.		244	Watts, In re		512
—— v. The Duke of Beau-			Westfield v. Shipwith		277
fort		209	Whitworth v. Gaugain		728
Stamford, The Earl of, At-			Wilmot, Clarke v.		276
torney-General v.		737	Wood and Others, Corpora-		
Stanley v. Bond		103	tion of Gloucester, v.		493
Steele v. Stewart		471	—— v. Lambirth		8
Stewart, Steele v.		471	Woodcock v. Renneck		72
Styan, In re		105			
Sutton, Morrall v.		533			
T			Z		
Taylor v. Rundell		222	Zulueta v. Ardouin		368
Thellusson, Vernon v.		466			

CHANCELLORS

AND

MASTERS OF THE ROLLS.

CHARLES II. RESTORATION, 29 MAY, 1660.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.	
1660. Jun. 1.	SIR EDWARD HYDE.		JOHN LORD COLEPEPER. SIR HARBOTTLE GRIM- STONE.	
Nov. 2.				
1667. Aug. 31.	ANTHONY EARL OF SHAFTESBURY.	SIR ORLANDO BRIDG- MAN.		
1672. Nov. 17.		SIR HENEAGE FINCH, BART. (LORD FINCH OF DAVENTRE, 10 Jan. 1674).		
1673. Nov. 9.				
1675. Dec. 19.	HENEAGE LORD FINCH OF DAVENTRE (EARL OF NOTTINGHAM, 12 May, 1681).	SIR FRANCIS NORTH (LORD GUILDFORD, 27 Sept. 1683).		
1682. Dec. 20.				
1685.			SIR JOHN CHURCHILL	

JAMES II. 6 FEBRUARY, 1685.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1685. Feb.	GEORGE LORD JEFFRIES.	FRANCIS LORD GUILDFORD.	SIR JOHN TREVOR.
Sep. 5.		THE KING.	
Sep. 28.			
Oct. 20.			

This Table is extracted (with the Author's permission) from Mr. THOS. DUFFUS HARDY'S "Catalogue of Lords Chancellors," &c. with a few insertions from the notes of that work, to make it more convenient for practical reference.

WILLIAM AND MARY. 13 FEBRUARY, 1689.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1689. Mar. 4.	JOHN LORD SOMERS.	SIR JOHN MAYNARD, ANTHONY KECK, WIL. RAWLINSON.	HENRY POWLE.
Mar. 13. 1690. May 14.		SIR JOHN TREVOR, SIR WIL. RAWLINSON, SIR GEO. HUTCHINS.	
1693. Jan. 13.		SIR JOHN SOMERS.	SIR JOHN TREVOR.
May. 1697. April 22. 1700. April 27.			
May 31.		LORD C. J. HOLT, SIR GEORGE TREBY, SIR EDW. WARD, C. B. SIR NATHAN WRIGHT.	

ANNE. 8 MARCH, 1702.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1702. 1705. Oct. 11.	WILLIAM LORD COWPER.	SIR NATHAN WRIGHT. WILLIAM COWPER, Q.C. (LORD COWPER).	
1707. May 4. 1708 Sep. 26.		SIR T. TREVOR, C. J. C. P. ; ROB. TRACY, J. C. P. ; JOHN SCROPE, B.	
Oct. 19.	SIMON LORD HARCOURT.	SIR SIMON HARCOURT, ATT. GEN. (LORD HAR- COURT, 3 Sept. 1711).	
1713. April 7.			

GEORGE I. 1 AUGUST, 1714.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1714. Aug. 3.	SIMON LORD HARCOURT.		
Sep. 21.	WILLIAM LORD COWPER.		

GEORGE I. — *continued.*

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1717. July 13. 1718. Apr. 18.		SIR ROBERT TRACY, J.; SIR JOHN PRATT, J.; SIR JAS. MONTAGUE, B.	SIR JOSEPH JEKYLL.
May 12.	THOMAS LORD PARKER (EARL OF MACCLESFIELD, 15 Nov. 1721).		
1725. Jan. 7.		SIR JOS. JEKYLL, M. R.; SIR GEOFF. GILBERT; SIR ROBT. RAYMOND.	
June 1.	PETER LORD KING.		

GEORGE II. 11 JUNE 1727.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1727. June 16.	PETER LORD KING.		
1733. Nov. 29.	CHARLES TALBOT, Esq. (LORD TALBOT, 5 Dec.).		
1737. Feb. 14. Feb. 21.	PHILIP LORD HARD- WICKE.	THE KING.	
1738. Oct. 9.			JOHN VERNEY.
1741. Nov. 5.			WILLIAM FORTESCUE.
1750. Jan. 11.			SIR JOHN STRANGE.
1754. May 29.			SIR THOMAS CLARKE.
1756. Nov. 19.		SIR J. WILLES, C. J. C. P.; SIR S. S. SMYTHE, B.; SIR J. E. WILMOT, J.	
1757. June 30.		SIR ROBERT HENLEY (LORD HENLEY, 27 March, 1760).	

GEORGE III. 25 OCTOBER 1760.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1761. Jan. 16.	ROBERT LORD HENLEY (EARL OF NORTHINGTON, 19 May, 1764).		

GEORGE III. — *continued.*

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1764. Dec. 4. 1766. July 30. 1770. Jan. 17. Jan. 21.	CHARLES LORD CAMDEN. HON. CHARLES YORKE.	SIR S. S. SMYTHE, B.; HON. H. BATHURST, J.; SIR RICHD. ASTON, J.	SIR THOMAS SEWELL.
1771. Jan. 23.	HON. HENRY BATHURST (created LORD ARLWY).		
1778. June 3.	EDWARD THURLOW, Esq. (created LORD THURLOW).		
1783. April 9.		ALEX. LORD LOUGH- BOROUGH, C. J. K. B.; SIR W. H. ASHURST, J.; SIR BEAU. HOTHAM, B.	
Dec. 23.	EDWARD LORD THURLOW.		
1784. Mar. 30.			LLOYD KENYON, Esq. (LORD KENYON, 9 June, 1788).
1788. June 4.			SIR RICHARD PEPPER ARDEN.
1789. June 15.		SIR JAMES EYRE, C. B.; SIR W. H. ASHURST, J.; SIR JOHN WILSON, J.	
1793. Jan. 23.	ALEX. LORD LOUGH- BOROUGH (EARL OF ROSELYN, 21 Apr. 1801).		
1801. April 14.	JOHN LORD ELDON, C. J. Com. Pl.		SIR WILLIAM GRANT.
May 27. 1808. Feb. 7.	HON. THOMAS ERSKINE (created LORD ERSKINE).		
1807. April 1. 1818. Jan. 6.	JOHN LORD ELDON.		SIR THOMAS PLUMER.

GEORGE IV. 29 JANUARY, 1820.

An. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1820. Jan. 30.	JOHN LORD ELDON (FAME OF ELDON, 7th Jan. 1821).		
1824. April 5.			ROBERT LORD GIFFORD.

GEORGE IV. — *continued.*

As. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1826. Sep. 14.	JOHN SINGLETON LORD LYNDHURST.		SIR JOHN SINGLETON COPLEY.
1827. May 2.			
May 3.			SIR JOHN LEACH.

WILLIAM IV. 26 JUNE, 1830.

An. Dom.	Chancellors.	Keepers of Seal.	Justices of the Peace.
1830. June.	LORD LYNDHURST.	SIR C. C. PEPYS, M. R. ; SIR LANCELOT SHAD- WELL, V. C. ; SIR J. B. BOSANQUET, J.	SIR CHARLES CHRISTO- PHER PEPYS.
Nov. 22.	HENRY LORD BROUGHAM AND VAUX.		
1834. Sep. 29.	LORD LYNDHURST.		
Nov. 22. 1835. April 23.			
1836. Jan. 16.			
Jan. 19.		HENRY BICKERSTETH (created LORD LANGDALE).	

VICTORIA. 20 JUNE, 1837.

As. Dom.	Chancellors.	Keepers of Seal.	Masters of Rolls.
1837. June.	LORD COTTENHAM.		
1841. Sep. 3.	LORD LYNDHURST.		
1844. July.	LORD COTTENHAM.		

VICE-CHANCELLORS.

GEORGE III.

An. Dom.	Vice-Chancellors of England.
1813. April 14. 1818. January 13.	SIR THOMAS PLUMER. SIR JOHN LEACH.

GEORGE IV.

An. Dom.	Vice-Chancellors of England.
1827. May 4. Nov. 1.	SIR ANTHONY HART. SIR LANCELOT SHADWELL.

VICTORIA.

An. Dom.	Vice-Chancellors of England.	Vice-Chancellors under stat. 5 Vict.
1837. 1841. October 28.	SIR LANCELOT SHADWELL.	1st. SIR JAMES LEWIS KNIGHT BRUCE. 2nd. SIR JAMES WIGRAM.

ORDERS IN CHANCERY.

i

1841.

GENERAL ORDER.

Tuesday, October 12th, 1841.

[This order, which was made in pursuance of the 5 *Vict. c. 5. ss. 2. 3.*, and which contained certain regulations respecting the transfer of suits and matters from the equity side of the Court of Exchequer to the Court of Chancery, was discharged, and other regulations substituted, by the 30th Order of the 26th of *October, 1842. (a)*]

(a) See *post*, p. xxxiii.

ORDER OF COURT.

1st November, 1841.

WHEREAS powers of attorney have been granted by divers persons, empowering other persons to demand and receive cheques payable by the Accountant-General of the Court of Exchequer; and the office of such Accountant-General has, by virtue of the act passed in the 5th year of the reign of her present Majesty, intituled "An Act to make further Provision for the Administration of Justice," ceased to exist. I, *John Singleton Lord Lyndhurst*, the Lord Chancellor, do hereby, pursuant to the said act, direct that the Accountant-General of the Court of Chancery, and the Governor and Company of the Bank of *England*, be at liberty to act upon, or under, the several powers of attorney which may have been granted or given according to the practice of the Court of Exchequer for paying over any sum or

VOL. I.

a

sums

1841.

sums of money, in the same manner as if such powers had been granted to be acted upon by the Accountant-General of the Court of Chancery, in the form and according to the usage of his office; and all receipts which shall be given by the persons to whom such powers may have been so granted, according to the practice of the Court of Exchequer as aforesaid, shall be good and valid discharges to the Accountant-General of the Court of Chancery and the Governor and Company of the Bank of *England*, respectively, as they would have been if such powers had been given to be acted upon by the Accountant-General of the Court of Chancery.

LYNDHURST C.

ORDER OF COURT.

11th *November*, 1841.

WHEREAS an act was passed in the fifth year of the reign of her present Majesty intituled “An Act to make further Provisions for the Administration of Justice;” and whereas, under the powers in that act contained, two additional Vice-Chancellors have been appointed: Now I do hereby order, —

I.

On bills now marked “Lord Chancellor,” plaintiff to add title of a Vice-Chancellor, to whose Court the cause shall be attached.

THAT in all informations or bills marked under the first order of the 5th day of *May*, 1837, with the words “Lord Chancellor,” the plaintiff shall, underneath the words “Lord Chancellor,” write the title of one of the three Vice-Chancellors, at his option; and the cause shall thenceforth, unless removed by some special order of

ORDERS IN CHANCERY.

iii.

of the Lord Chancellor, be attached to such Vice-Chancellor's Court.

1841.

II.

THAT the title of the Vice-Chancellor, to whose Court any cause shall be attached, shall be marked in every certificate granted under the second order of the 5th day of *May*, 1837.

Certificate that cause is ready for hearing to be marked in like manner.

III.

THAT, subject in every case to any special order made or to be made by the Lord Chancellor, every cause already heard by any Vice-Chancellor since the first day of this present *Michaelmas* term, be attached to the Court of the Vice-Chancellor by whom the same has been heard; and every cause standing in the Lord Chancellor's book of causes, down to and inclusive of the cause of *Hodges v. Daly*, shall be attached to the Court of the judge to whom the same is appropriated in the said book.

Assignment to the different Courts of certain causes now standing for hearing.

IV.

THAT the plaintiff in every cause now in the Lord Chancellor's Court, whether already heard, standing for hearing, or otherwise, except those mentioned in the last preceding Order, shall be at liberty to deliver a notice to his clerk in Court, stating the name of the Vice-Chancellor, to whose Court he desires such cause to be attached, and to serve notice thereof on all parties to the cause; and in case the plaintiff shall neglect or omit so to do on or before the 17th day of *November* instant, the defendant, or any one of the defendants, shall be at liberty to give such notice; and in case, on the 21st day of *November* instant, no such notice shall have been given, then any person who may be desirous of applying to the Court in such cause shall be at

How the other causes now pending are to be assigned.

1841.

No proceedings to be taken in any cause until assigned.

All applications in cause to be made to the Judge to whom cause assigned.

Proceedings not in a cause how to be intituled.

Registrars to keep distinct lists of causes, &c. in each Court.

liberty to give such notice ; and that the notice of the plaintiff, if given on or before the said 17th day of *November* instant, or if not so given, then the notice whether of the plaintiff or of any one of the defendants first given after the said 17th day of *November* instant, and before the said 21st day of *November* instant, and the notice of the plaintiff, or of any one of the defendants, or of the person desirous of applying as aforesaid, first given on or after the said 21st day of *November* instant, shall determine the Court to which such cause shall be attached, unless removed therefrom by any special order to be made by the Lord Chancellor ; and that no party or person shall move, petition, or take any proceedings until such notice has been given.

V.

THAT all motions, petitions, and further proceedings in causes in the Lord Chancellor's Court, except any motions or proceedings which are now part heard, shall be had before the judge to whose Court the same shall under the provisions of these Orders be attached, unless removed therefrom by any special order of the Lord Chancellor.(a)

VI.

THAT all notices of motion not in any cause, and all petitions not in any cause, which are presented to the Lord Chancellor, shall be marked with the title of one of the Vice-Chancellors, and shall thenceforth be attached to such Vice-Chancellor's Court, unless removed therefrom by any special order of the Lord Chancellor.

VII.

THAT the registrars shall keep distinct lists of the causes and other matters to be heard before each Judge.

LYNDHURST, C.

(a) See Order of 5th August, 1849, *post*, p. xviii.

1841.

for sealing at
Subpœna
Office.

Effect of *dis-*
tringas.

an affidavit, duly sworn by the person, or one of the persons applying for such writ, or his solicitor, before one of the Masters or Masters Extraordinary of this Court, in the form set out at the foot of these Orders, the same writ shall (in conformity with the Orders of this Court, for issuing and sealing writs of *subpœna*,) be forthwith sealed with the seal of the *Subpœna* Office, and such writ, when sealed, shall have the same force and validity as the writ of *distringas* heretofore issued out of the Court of Exchequer.

III.

How to be
discharged.

THAT such writ of *distringas*, and all process thereunder, may, at any time, be discharged by the order of this Court, to be obtained, as of course, upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application, by motion or notice, or by petition duly served, of any other person claiming to be interested in the stock sought to be affected by such writ, and that upon or after such application, such costs thereof, and in relation thereto, and to the said writ, as to this Court shall seem just, may, if this Court shall think fit, be awarded, and ordered to be paid by the person or persons who obtained such *distringas*, or upon an application by any other person or persons, by such person or persons.

Costs.

IV.

Distringas not
to remain in
force for more
than eight
days after ap-
plication for
dividends or
transfer by
party in whose
name stock is
standing.

THAT the Governor and Company of the Bank of *England* having been served with such writ of *distringas*, and a notice, not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or
some

ORDERS IN CHANCERY.

vii'

some person on his or their behalf, or representing him or them, to allow such transfer, or to pay such dividends, shall not by force, or in consequence of such *distringas*, be authorised, without the order of this Court, to refuse to permit such transfer to be made, or to withhold payment of such dividends for more than eight days after the date of such request.

1841.

V.

THAT upon leaving such affidavit as aforesaid with the patentee of the *Subpoena* Office, there shall be paid to such patentee the sum of 1s. for filing such affidavit, and that within twenty-four hours from the time when such affidavit shall be so left, the said patentee shall pay the said sum of 1s. to the clerk of the affidavits, and cause such affidavit to be filed and registered at the office of such clerk.

Fee on leaving affidavit.

VI.

THAT upon the sealing of such writ of *distringas* the sum of 5s. 6d. shall be paid to the patentee of the *Subpoena* Office; and that out of such sum the said patentee shall pay the sum of 4s. to the Accountant-General, to be by him placed to the credit of the account entitled "The Suitors' Fee Fund Account."

Fee on sealing writ.

VII.

THAT for and in respect of the preparation and service of such writ of *distringas*, and the *præcipe* and attendance in respect thereof, such costs shall be allowed as by the rules and practice of this Court are allowed, for the preparation, and service, and attendance in respect of a writ of *subpoena* to answer a bill.

Costs of preparing and serving writ.

1841.

Form of
affidavit.

FORM OF AFFIDAVIT.

Y. Z. [*the name of the party on whose behalf the writ is sued out*] v. The Governor and Company of the Bank of England.

I, A. B., of _____ do solemnly swear, that according to the best of my knowledge, information, and belief, I am [*or, if the affidavit is made by the solicitor, C. D. of _____ is*] *bonâ fide* and beneficially interested in the stock hereinafter particularly described; that is to say, [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing,*] and that I have reason to believe, and do believe, that there is danger of such stock being dealt with in a manner prejudicial to my interest [*or to the interest of the said C. D. (as the case may be)*]. (a)

(Signed) LYNDHURST, C.
 LANGDALE, M. R.
 LANCELOT SHADWELL, V. C.
 J. L. KNIGHT BRUCE, V. C.
 JAMES WIGRAM, V. C.

(a) Amended by Order of 10th December, 1841, see *post*, p. x.

ORDER OF COURT.

19th November, 1841.

WHEREAS it is expedient that further Orders should be made for the better administration of justice in the Court of Chancery with reference to the matters to which the 1st 2d, 3d, 4th, and 5th Orders of the
 26th

1841.

ORDER OF COURT.

10th December, 1841.

The Right Honourable JOHN SINGLETON Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Honourable the Vice-Chancellor JAMES LEWIS KNIGHT BRUCE, and the Honourable the Vice-Chancellor JAMES WIGRAM, and in pursuance of an Act passed in the fifth year of the reign of her present Majesty, intituled “ An Act to make further Provisions for the Administration of Justice,” doth hereby order and direct in manner following ; that is to say, —

THAT the affidavit required by the 2d of the Orders of the 17th day of November, 1841, shall, instead of being in the form set out at the foot of those Orders, be in the form following : —

Amended
form of affi-
davit required
for obtaining
writ of dis-
tringas, under
second Order
of 17th Nov.
1841.

A. B. [*the name of the party or parties in whose behalf the writ is sued out*] v. The Governor and Company of the Bank of England.

I, _____ of _____ do solemnly swear,
that, according to the best of my knowledge, information,
and belief, I am [*or, if the affidavit is made by the soli-
citor, A. B., of* _____ is] beneficially interested in
the stock hereinafter particularly described ; that is to
say [*here specify the amount of the stock to be affected by*
the

1842.

ORDER OF COURT.

11th *April*, 1842.

The Right Honourable JOHN SINGLETON Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fourth year of the reign of her present Majesty, intituled “An Act for facilitating the Administration of Justice in the Court of Chancery,” and of an Act passed in the fourth and fifth years of the reign of her present Majesty, intituled, “An Act to amend an Act of the fourth Year of the Reign of Her present Majesty, intituled ‘An Act for facilitating the Administration of Justice in the Court of Chancery,’” order and direct in manner following; that is to say, —

I.

Defendant in contempt for want of answer, when to be deemed to have absconded.

THAT in cases where the defendant shall not have put in his answer in due time after appearance, and the plaintiff shall be unable with due diligence to procure a writ of attachment to be executed against such defendant, by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then,

1842.

sions of this Order, to be deemed to have absconded, and that such notice of motion has been inserted in the *London Gazette* at least once in every week from the time of the first insertion thereof, up to the time for which the said notice shall have been given; and the Court being so satisfied, and the answer not having been filed, may, if it shall so think fit, order the bill to be taken *pro confesso* against such defendant, either immediately, or at such time, or upon such further notice as under the circumstances of the case the Court may think proper.

II.

Mode of proceeding where infant defendant in default for appearance or answer.

THAT upon default by an infant defendant in not appearing to, or not answering the bill, the Court may, upon motion, order that the Senior Six Clerk not towards the cause may be assigned guardian of such infant defendant, by whom he may appear to and answer, or may answer the bill and defend the suit, upon the Court being satisfied that such defendant is an infant, and if the infant has not appeared, that the *subpœna* to appear to and answer the bill was duly served, and (whether the infant has appeared or not) that a notice of such motion was (after the expiration of the time for appearing to or answering the bill, and at least six clear days before the hearing of such motion,) served upon or left at the dwelling-house of the person with whom or under whose care such infant defendant was at the time of serving the *subpœna*, and was also served upon or left at the dwelling-house of the father or guardian (if any) of such infant, where the person with whom or under whose care the infant was at the time of such service shall not be the father or guardian of the infant, unless the Court at the time of hearing such motion shall think fit to dispense with such last-mentioned service.

III. THAT

ORDERS IN CHANCERY.

xv.

III.

1842.

THAT the plaintiff shall, without special leave of the Court, be at liberty to serve any notice of motion, or other notice, or any petition, personally or at the dwelling-house or office of any defendant, who having been duly served with *subpœna* to appear to and answer the bill shall not have caused an appearance to be entered by his own clerk in Court at the time for that purpose limited by the General Orders of the Court.

Defendant not appearing in proper time after service of *subpœna*, may be served with notices, &c. personally or at his dwelling-house.

IV.

THAT the 1st, 2d, 3d, 4th, and 5th of the Orders of the 26th day of *August*, 1841, shall not take effect until further order.

Five first Orders of *August*, 1841, suspended *sine die*.

V.

THAT the 22d of the Orders of the 26th day of *August*, 1841, shall be suspended until further order.

Also the 22d.

VI.

THAT the Orders of the 26th day of *August*, 1841, shall be amended as to numbers X. XI. XII. and XLVII. in manner following; that is to say,

Certain Orders of *August*, 1841, amended.

X.

THAT no writ of execution shall hereafter be issued for the purpose of requiring or compelling obedience to any Order or Decree of the High Court of Chancery, but that the party required by any such order or decree to do any act shall, upon being duly served with such Order or Decree, be held bound to do such act in obedience to the Order or Decree.

Writ of execution for enforcing orders, &c. abolished.

XI.

THAT if any party, who is by an Order or Decree ordered to pay money or to do any other act in a limited time,

Party failing to obey order, &c. within

1842.

time limited,
attachment
may issue.

If party be
taken or de-
tained, seques-
tration may
issue.

If not taken,
either seques-
tration or or-
der for Ser-
jeant-at-Arms,
&c.

time, shall, after due service of such Order or Decree, refuse or neglect to obey the same according to the exigency thereof, the party prosecuting such Order or Decree shall, at the expiration of the time limited for the performance thereof, be entitled to a writ or writs of attachment against the disobedient party; and in case such party shall be taken or detained in custody under any such writ of attachment without obeying the same Order or Decree, then the party prosecuting the same Order or Decree shall, upon the sheriff's return that the party has been so taken or detained, be entitled to a commission of sequestration against the estate and effects of the disobedient party; and in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the party prosecuting the same order or decree shall be entitled, at his option, either to a commission of sequestration in the first instance, or otherwise to an order for the Serjeant-at-Arms, and to such other process as he hath hitherto been entitled to upon a return *non est inventus* made by the commissioners named in a commission of rebellion issued for the non-performance of an Order or Decree.

XII.

Orders, &c. to
state time for
doing the act
required to be
done.

THAT every Order or Decree requiring any party to do an act thereby ordered shall state the time or the time after service of the Order or Decree within which the act is to be done; and that upon the copy of the Order or Decree which shall be served upon the party required to obey the same there shall be endorsed a memorandum in the words or to the effect following; viz. —

Memorandum
to be endorsed,
on order, &c.

“ If you the within named *A. B.* neglect to obey this Order (or Decree) by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the Serjeant-

Serjeant-at-Arms attending the same Court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same Order (or Decree)."

1842.

XLVII.

THAT a creditor who has come in and established his debt before the Master, under a Decree or Order in a suit, shall be entitled to the costs of so establishing his debt; and the sum to be allowed for such costs shall be fixed by the Master, without taxation, at the time the Master allows the debt of such creditor, unless the Master shall think that such costs ought to be taxed in the regular mode; in which case the same shall be so taxed by the Master, and the amount of such costs, or the sum allowed in respect thereof, shall be added to the debt so established.

Creditors' costs of proving their debts under Decree may be fixed by Master without taxation.

(Signed)

LYNDHURST, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C.
J. L. KNIGHT BRUCE, V. C.
JAMES WIGRAM, V. C.

1842.



ORDER OF COURT.

Friday the 5th of August, 1842.

The 15th Order of the 5th of *May*, 1837, whereby application for special orders may, in the vacations, be made to any of the Judges, extended to the new Vice-Chancellors.

WHEREAS, by the 15th of the Orders, bearing date the 5th day of *May*, 1837 (*a*), it is ordered, That in the interval between the close of the sittings after any term and the commencement of the sittings before or at the beginning of the next ensuing term, applications for special orders may be made to any Judge of the Court, in the same manner as if the Orders of the said 5th day of *May* had not been made; but that the Orders which shall be made in any such interval by the Lord Chancellor or by the Master of the Rolls, or by the Vice-Chancellor, shall, if not made by the Judge to whom the application, if made during the ordinary sittings of the Court, would have been made, pursuant to the directions contained in the Orders of the said 5th day of *May*, be marked as having been made for such Judge, and shall, in the future proceedings of the cause, be deemed to be the Order of such Judge, in all respects, save this,—that no Order so made by one Judge for another, under the circumstances aforesaid, shall be reheard, for the purpose of being discharged or varied, otherwise than by the Lord Chancellor: And whereas, by reason of the appointment of two additional Judges of the High Court of Chancery, it has become necessary to extend the operation of the said recited Order: And whereas, by the 5th of the Orders, bearing date the 11th day of *November*, 1841 (*b*), it is ordered, That all motions, petitions, and further proceedings in causes in the Lord Chancellor's Court, except any motions or proceedings

(*a*) *Ordines Can.* 118.(*b*) *Ib.* 185.

ORDERS IN CHANCERY.

xix

1842.

proceedings which were then part heard, should be had before the Judge to whose Court the same should, under the provisions of the said Orders of the 11th day of *November*, 1841, be attached, unless removed therefrom by any special order of the Lord Chancellor : Now, therefore, I, the Right Honourable *John Singleton* Lord *Lyndhurst*, Lord High Chancellor of *Great Britain*, by and with the advice and assistance of the Right Honourable *Henry* Lord *Langdale*, Master of the Rolls, the Right Honourable Sir *Lancelot Shadwell*, Vice-Chancellor of *England*, the Right Honourable the Vice-Chancellor Sir *James Lewis Knight Bruce*, and the Right Honourable the Vice-Chancellor Sir *James Wigram*, do hereby order and direct, That the said 15th Order of the said 5th day of *May* shall extend to applications for special orders, to be made in the interval therein mentioned, to, and also to Orders to be made in such interval by, any Judge of the Court of Chancery, as such Court is now constituted ; and that, subject to the provisions of the said 15th Order of the 5th day of *May*, 1837, the said 5th Order of the 11th day of *November*, 1841, shall not extend to applications and orders to be made in such interval as aforesaid.

(Signed) LYNDHURST, C.
 LANGDALE, M. R.
 LANCELOT SHADWELL, V. C. E.
 J. L. KNIGHT BRUCE, V. C.
 JAMES WIGRAM, V. C.

1842.

ORDER OF COURT,

Wednesday, October 26th, 1842.

The Right Honourable JOHN SINGLETON Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament, passed in the fifth and sixth years of the reign of her present Majesty, intituled “An Act for abolishing certain Offices in the High Court of Chancery in England (*a*);” and in pursuance and execution of all other powers, enabling him in that behalf, order and direct in manner following; that is to say, —

Clerk of Inrolments.

CLERK OF THE INROLMENTS IN CHANCERY.

I.

Acknowledgments, &c. for inrolling deeds, &c. may be made before him or before any Clerk of Records or Writs.

THAT all acknowledgments, affidavits, or affirmations required for the purpose of inrolling any deed or other document in Chancery may be made, sworn, or affirmed before the Clerk of Inrolments in Chancery, or before any Clerk of Records and Writs, as occasion may require for the better despatch of business.

II. THAT

(a) 5 & 6 Vict. c. 103.

ORDERS IN CHANCERY.

xxi

II.

1842.

THAT the Clerk of Inrolments in Chancery shall take and receive all such fees and sums of money as have heretofore been lawfully received by the Clerks of Inrolments and their deputies, or by the Six Clerks, or any of them as Comptrollers of the Hanaper, or as Riding Clerk, and shall pay all such fees and sums of money into the Bank of *England*, in the name of the Accountant-General, to be placed to the credit of the account intituled "The Suitors' Fee Fund Account."

Fees to be received by him,

and carried to fee fund account.

CLERKS OF RECORDS AND WRITS.

Clerks of Records and Writs.

III.

THAT the Clerks of Records and Writs shall perform all such duties as have heretofore been performed by the Six Clerks, Sworn Clerks, or Waiting Clerks as officers of the Court, in relation to the several matters hereinafter mentioned; that is to say,—

Certain duties of Six Clerks, &c. as officers of the Court, transferred to them.

The filing, custody, copying, and amending of all informations, bills, demurrers, pleas, answers, and other pleadings and records.

The entering of appearances, rules, consents, notes, and memorandums of service.

The certifying of appearances and proceedings.

The custody of exhibits deposited for inspecting and copying.

The attendance with records and exhibits on the Judges of the Courts, on the Masters in Ordinary, and at assizes or elsewhere.

The inrolment of decrees and orders.

And all other duties heretofore performed by the Six Clerks, Sworn Clerks, or Waiting Clerks as officers of the Court, in relation to suits and matters in equity, and not as attornies, solicitors, or agents of the parties in suits or matters in equity.

b 3

IV. THAT

1842.

Writs heretofore issued out of Six Clerks' Office to be sealed by them,

not to require signature of Lord Chancellor.

IV.

THAT the Clerks of Records and Writs shall forthwith provide a seal, in such form, and bearing such impression, as the Lord Chancellor shall approve of; and that any person desirous of suing out any writ which has heretofore been issued out of the Six Clerks' Office may prepare the same in the present form, or in such other form as the Lord Chancellor may hereafter direct, and may present such writ for sealing to the Clerk of Records and Writs, in whose division the cause is; and such writs shall henceforth be open writs, and it shall no longer be necessary for the Lord Chancellor to sign any such writ; and that the Clerk of Records and Writs to whom any such writ shall be presented for sealing, shall thereupon ascertain whether such writ is correct in form, and whether the person presenting the same is, according to the course and practice of the Court, entitled to sue out the same; and in case it shall appear that such writ is correct in form, and that the person is entitled to sue out the same, such writ shall be forthwith sealed with such seal as aforesaid, and shall, when so sealed, have the same force and validity, as such writ now has when sealed with the Great Seal.

V.

Exceptions for scandal, &c. to be filed with them.

THAT all exceptions for scandal, impertinence, and insufficiency shall be filed with the Clerk of Records and Writs in whose division the cause may be.

VI.

Security for costs to be given to them.

THAT in cases where security for costs has heretofore been directed to be given to a Six Clerk, such security shall be directed to be given to the Clerk of Records and Writs in whose division the cause is.

VII. **THAT**

ORDERS IN CHANCERY.

xxiii

VII.

1842.

THAT pleas, answers, affidavits or affirmations, whereon to ground process of contempt, affidavits or affirmations required to be annexed to bills, and oaths or affirmations as to the carriage of pleas, answers, examinations, or depositions of witnesses, taken before commissioners in the country, may be sworn, affirmed, or attested upon honour, before any Clerk of Records and Writs, or before the Clerk of Inrolment in Chancery, as occasion may require, for the better despatch of business.

Pleas, answers, &c. to be sworn either before them or before Clerk of Inrolment.

VIII.

THAT any Clerk of Records and Writs, being required to attend with any record or document at any assizes, or at any Court or place out of the Court of Chancery or the offices thereof, shall be entitled to require, that the solicitor, or party desiring such his attendance, shall deposit with him a sufficient sum of money to answer his just fees, charges, and expenses in respect of such attendance, and to undertake to pay any further just fees, charges, and expenses which may not be fully answered by such deposit.

When required to attend with Record, &c. out of Court of Chancery, their costs to be secured.

TAXING MASTERS.

Taxing Masters.

IX.

THAT the Taxing Masters shall perform all such duties as have heretofore been referred to or performed by the Masters in Ordinary in relation to the taxation of costs; and shall, in respect thereof, have all such powers and authorities as are now vested in the Masters in Ordinary,

Powers and duties of Masters in Ordinary in taxation of costs transferred to Taxing Masters.

To administer oaths,

To examine witnesses and parties,

To order the production and inspection of books, papers, and documents,

b 4

To

1842.

To proceed *de die in diem*,

To make separate reports and certificates,

To require that any party be represented by a separate solicitor,

And to direct and adopt all such other proceedings as may now be directed and adopted by the Master in Ordinary, on references for the taxation of costs and taking accounts of what is due in respect of such costs, and such other accounts connected therewith, as may be directed by the Court.

X.

Future references to be made to them in rotation.

THAT all references for the taxation of costs shall be made to the Taxing Master in rotation; or if there has been any former taxation of costs in the same cause or matter, then to the Taxing Master before whom such former taxation has taken place, either on a reference from the Court, or upon the request of a Master in Ordinary.

XI.

References now pending to be transferred.

THAT all bills of costs, which by any existing order have been referred for taxation to any Master in Ordinary, who shall not have certified the costs due thereon before the 28th day of *October* instant, are hereby transferred to the Taxing Masters, and shall respectively be taxed by the Taxing Master in rotation; and that if any bills of costs have been proceeded with, before the said 28th day of *October* instant, the Taxing Master, by whom the same shall be taxed, shall be at liberty to adopt the whole or such part as he shall think fit, of the proceedings which have taken place before the transfer, and may demand and receive for completing such taxation, such fees as would have been payable in respect thereof, in case such taxation had been continued and completed by the Master in Ordinary, including therein the fees

fees which, in such case, would have been payable to the Clerks in Court, for the completion of such taxation, or as near thereto as the circumstances of the case will admit.

1842.

XII.

THAT in cases where the account of any trustee, executor, administrator, receiver, consignee, or committee, shall consist in part of any bill of costs; and in cases of any proceedings under the twenty-second or twenty-third of the Orders of the 21st of *December*, 1833, or under the forty-seventh of the Orders of the 26th of *August*, 1841, as amended by the sixth of the Orders of the 11th of *April*, 1842, and in all other cases where, under any general order, the Master in Ordinary is at liberty to tax the costs of any proceeding before him, in respect of any exceptions, or any creditor's charge, or otherwise, the Master in Ordinary to whom it may be referred to take such account, or before whom any such proceeding may take place, shall be at liberty to request the Taxing Master in rotation, or the Taxing Master to whom any taxation in the same cause or matter may have been previously referred, to assist him in taxing and settling such bill of costs, not being the ordinary costs, on passing such account; and that the Taxing Master, on receiving such request, shall proceed to tax such bill, and shall have the same powers and may receive the same fees in respect thereof, as if the same had been referred to him by the Court, and shall return the same, with his opinion thereon, to the Master in Ordinary at whose request the same was taxed.

Where accounts or proceedings before a Master in Ordinary involve taxing of costs, such Master may request the assistance of Taxing Master. •

XIII.

THAT if, upon the taxation of any bill of costs, it shall appear to the Taxing Master that, for the purpose of

Books, &c. and certificates of proceedings

1842.

required for
taxation to be
transmitted on
request by
Master in
Ordinary to
Taxing Mas-
ter.

of duly taxing the same it is necessary to inspect any books, papers, or proceedings relating to the cause or matter which shall be in the office of any Master in Ordinary, the Taxing Master shall be at liberty to request the Master in Ordinary having any such book, paper, or proceeding in his office, to cause the same to be transmitted to the office of the Taxing Master; and also to request any Master in Ordinary to certify any proceedings in his office which may be comprised in a bill of costs under taxation; and that in such cases the Master in Ordinary, when, and so soon, and at and for such times as the due transaction of the business in his own office will permit, shall direct such books, papers, and documents to be transmitted to the office of the Taxing Master, for his use during the taxation, and shall certify the proceedings which have taken place in his office, according to the request of the Taxing Master; and that after the costs in respect of which such request of the Taxing Master was made shall have been certified, the Taxing Master shall cause the same books, papers, and documents which have been so transmitted to his office, if then remaining there, to be returned to the office of the Master in Ordinary by whom they were transmitted, unless it shall appear to the Master in Ordinary, and also to the Taxing Master, that any bill of costs, forming part of the papers so transmitted, ought to be retained by the Taxing Master, in which case the Taxing Master shall take charge of such bill of costs, subject to the order of the Court.

After costs
have been cer-
tified, the
books, &c. ex-
cept bills of
costs, to be re-
turned.

XIV.

Entries to be
made in such
cases in book
of Master in
Ordinary.

THAT when any paper or document shall be transmitted from the office of a Master in Ordinary to the office of a Taxing Master, an entry of such transmission shall be made in the Book of Proceedings of the Master in Ordinary, and shall be signed by the Taxing Master

ORDERS IN CHANCERY.

xxvii

or the clerk of the Taxing Master at whose request such paper or document may be transmitted; and that when any such paper or document shall be returned from the office of the Taxing Master to the office of the Master in Ordinary, an entry of such return shall be made in the said Book of Proceedings, and be signed by the Master in Ordinary or his clerk.

1842.

XV.

THAT the Taxing Masters are to be respectively assistant to each other; and that in the discharge of their duties, and for the better despatch of the business of their respective offices, any Taxing Master may tax or assist in the taxation of a bill of costs which has been referred for taxation, and for ascertaining what is due in respect of such costs to any other Taxing Master, and in such case shall certify accordingly.

Taxing Masters to assist each other.

SOLICITORS. — PARTIES ACTING IN PERSON.

XVI.

THAT the solicitors of this Court in all cases where the parties sue or defend by solicitors, and the parties themselves in all cases where they sue or defend in person, shall perform all such duties as have heretofore been performed by the Sworn Clerks and Waiting Clerks, as attorneys, solicitors, or agents of the parties in relation to the several matters hereinafter mentioned; viz.

The making out of writs.

The serving and being served with writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, in causes and matters depending in Court.

The signing of elections and agreements to proceed at law or in equity.

The signing of petitions of rehearing and appeal.

The

Solicitors.— Parties acting in person.

Duties heretofore performed by Sworn Clerks and Waiting Clerks, as attorneys and agents of the parties, to be performed by the parties themselves or their solicitors.

1842.



The entering of appearances and consents with the Registrar.

The signing of consents to petitions.

The tender and acceptance of costs.

The joining in commission and striking of Commissioners' names.

The signing of notices by paupers.

And all other duties heretofore performed by the Sworn Clerks and Waiting Clerks, as attorneys, solicitors, or agents of the parties in suits or matters in equity.

XVII.

Solicitors to indorse their names, places of business, and addresses for service, on all writs sued out or proceedings filed by them.

THAT every solicitor of a party suing or defending by a solicitor shall cause to be indorsed or written upon every writ which he shall sue out, and upon every information, bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions, which he may leave with the Clerks of Records and Writs to be filed, and upon all instructions which he may give to the Clerks of Records and Writs for any appearance or other purpose, his name, and place of business, and also (if his place of business shall be more than three miles from the Record and Writ Clerks' Office) another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, may be left for him; and where any such solicitor shall only be the agent of any other solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

XVIII.

Parties not to change their solicitor, with-

THAT a party suing or defending by a solicitor shall not be at liberty to change his solicitor in any cause or matter

ORDERS IN CHANCERY.

xxix

matter without an order of the Court for that purpose, which may be obtained by motion or petition, as of course; and that, until such order is obtained and served, and notice thereof given to the clerk of records and writs, the former solicitor shall be considered the solicitor of the party.

1842.

out an order
of Court.

XIX.

THAT where the party sues or defends by a solicitor, and no address for service of such solicitor shall have been indorsed or added pursuant to the directions of the seventeenth Order, all writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, and which have heretofore been served upon the Sworn Clerks, or Waiting Clerks, shall, unless the Court shall otherwise direct, be deemed sufficiently served upon the party, if served upon his solicitor at his place of business; but if an address for service of such solicitor shall have been indorsed or added as aforesaid, then all such writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party, if left for his solicitor at such address for service.

Writs, &c. not
requiring per-
sonal service
may be served
on solicitor.

XX.

THAT every party suing or defending in person shall cause to be endorsed or written upon every writ which he shall sue out, and upon every information, bill, demurrer, plea, answer, or other pleading, or proceeding, and all exceptions which he may leave with the Clerks of Records and Writs, to be filed, and upon all instructions which he may give to the Clerks of Records and Writs for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall

Parties acting
in person to
endorse their
names and re-
sidences, and
addresses for
service, on all
writs sued out
and proceed-
ings filed by
them.

ORDERS IN CHANCERY.

1842.

shall be more than three miles from the Record and Writ Clerks' Office) [another proper place (to be called his address for service)], which shall not be more than three miles from the said office, where writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, may be left for him.

XXI.

Service how
to be made
upon parties
acting in per-
son.

THAT where the party sues or defends in person, and no address for service of such party shall have been endorsed or written pursuant to the directions of the twentieth Order; and in cases where any party has ceased to have a solicitor, all writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications not requiring personal service upon the party to be affected thereby, and which have heretofore been served upon the Sworn Clerks, or Waiting Clerks, shall, unless the Court shall otherwise direct, be deemed to be sufficiently served upon the party, if served upon him personally, or at his place of residence; but if an address for service of such party shall have been endorsed or added as aforesaid, then all such writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party, if left for him at such address for service.

XXII.

Service, other
than personal,
to be made be-
fore 8 o'clock
P. M., other-
wise to date
as from fol-
lowing day.

THAT all writs, notices, orders, warrants, rules, and other documents, proceedings and other written communications, not requiring personal service upon the party to be affected thereby, and which have heretofore been served on the Clerks in Court or Waiting Clerks, shall be served before eight o'clock in the evening of the day on which the same shall be served, or otherwise
the

ORDERS IN CHANCERY.

xxxi

the same shall be deemed to have been served on the next following day, excluding *Sundays*.

1842.

XXIII.

THAT when any solicitor or party shall cause an appearance to be entered, or an answer, demurrer, plea, or replication to be filed, he shall on the same day give notice thereof to the solicitor of the adverse party, or to the adverse party himself if he acts in person.

Notice to opposite side of entering appearance, filing answer, &c.

XXIV.

THAT when any exceptions for scandal, impertinence, or insufficiency shall be taken, the solicitor of the party taking the same, or the party himself if he acts in person, shall leave such exceptions at the Record and Writ Clerks' Office to be filed, and shall on the same day give notice of the filing thereof to the solicitor for the adverse party, or to the adverse party himself if he acts in person.

Do. of exceptions.

XXV.

THAT any solicitor signing any petition of rehearing or appeal, or any consent to a petition, or any notice of motion, or any proceeding or application to be made by a pauper, shall thereby become subject to all liabilities to which the Sworn Clerks have heretofore been subject in respect of such matters.

Liability of Sworn Clerks in certain cases transferred to solicitors.

XXVI.

THAT the solicitor for the party examining any witness before one of the Examiners is to serve the usual notice in writing, containing the name and description of such witness, upon the solicitor or solicitors of the adverse party or parties in the cause.

Notice to opposite side of examination of witness.

XXVII. THAT

1842.

Guardian, *ad litem*, for an infant defendant how to be assigned.

XXVII.
THAT for the purpose of procuring a guardian, *ad litem*, to be assigned in Court for an infant defendant, the solicitor is to attend the Court with the infant and proposed guardian, and request such assignment to be made; and he is to certify to the Court that the proposed guardian has no interest adverse to the interest of the infant, and is a proper person to be assigned guardian.

Solicitor may be assigned where formerly a Six Clerk.

Costs.

XXVIII.
THAT where, according to the present practice, it has been usual to assign a Six Clerk guardian *ad litem* of an infant or person of unsound mind, the Court may appoint one of the solicitors of the Court to be such guardian, and may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid, either by the parties or some one or more of the parties to the suit in which such appointment shall be made, or out of any fund in Court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require.

Clerk of affidavits.

CLERK OF AFFIDAVITS.

Affidavits, &c. may be sworn before him.

Fees.

XXIX.
THAT all affidavits and affirmations to be filed in the Affidavit Office may be sworn or affirmed before the Clerk of Affidavits, who is to receive the proper and usual fees for taking the same, and to pay the amount of the several sums which he may so receive into the Bank of *England*, to the account of the Suitors' Fee Fund.

VARIATION

VARIATION OF ORDERS.

1842.

XXX.

THAT the General Order, dated the 12th day of *October*, 1841, for giving effect to certain provisions in an act passed in the fifth year of the reign of her present Majesty, intituled “An Act to make further Provisions for the Administration of Justice,” for transferring to this Court all suits and matters which on the 15th day of *October*, 1841, should be depending in her Majesty’s Court of Exchequer as a court of equity, or under the special authority of any act or acts of Parliament, be hereby discharged, and in lieu thereof the following Order be hereby substituted; viz. That as to all records and documents heretofore belonging to the said Court of Exchequer as aforesaid, and not yet brought into the Court of Chancery, the Clerk of Records and Writs, to whose department such suit would belong, shall, upon request of any of the parties, apply for the records and other documents in such suit not before brought into the Court of Chancery: And it is hereby further ordered, that so far as regards the taxation and allowance of costs in any of the suits or matters to be transferred in pursuance of the said act, and which shall not, by any order of this Court, be directed to be regulated, in that particular, by the late practice of the Court of Exchequer, such costs shall be taxed and allowed in manner following; that is to say, the costs previously to the said 15th day of *October*, 1841, shall be taxed and allowed according to the practice of the said Court of Exchequer, and the costs from and inclusive of the said 15th day of *October*, shall be taxed and allowed according to the practice of this Court.

Order of 12th *October*, 1841, as to transfer of suits from Exchequer discharged.

Records, &c. in Exchequer suits, how to be transferred to Court of Chancery.

Costs of Exchequer suits how to be taxed.

XXXI.

THAT the fourth of the Orders of the 3d *April*, 1828, shall be interpreted as if the same were amended by
Vol. I. c substituting.

Amendment of 4th Order of 3d *April*, 1828;

1842.

Amendment
of 20th Order
of 3d *April*,
1828.

Do. of 43d Or-
der of do.

Do. of 76th
amended Or-
der of 23d
Nov. 1831.

Do. of 2d
Order of 11th
April, 1842.

Former Orders
to be inter-
preted as if
amended and
made consist-
ent with 5 &
6 *Vict. c.* 103.
and Orders
issued in pur-
suance there-
of.

Registrars, &c.
to adapt lan-
guage of Or-
ders to the
new practice.

substituting the word "file" for the word "deliver."
That the twentieth of the same Orders shall be in-
terpreted as if the same were amended by substituting
the word "Solicitor" for the words "Clerk in Court."
That the forty-third of the same Orders shall be in-
terpreted as if the same were amended by substitut-
ing the words "Record and Writ Clerks' Office" for
the words "Six Clerks' Office." That so much and
such parts of the seventy-sixth of the same Orders,
amended by the Orders of the 23d *November*, 1831, as
relate to the taxation of costs, shall be interpreted as
if the same were further amended by substituting the
words "Taxing Master" for the word "Master."
That the second of the Orders of the 11th *April*,
1842, shall be interpreted as if the same were amended
by substituting the words "One of the Solicitors of
this Court," for the words "The Senior Six Clerk not
towards the cause." And that in like manner where,
by reason of the said act of Parliament made and
passed in the fifth and sixth year of her Majesty, in-
titled "An Act for abolishing certain Offices of the
High Court of Chancery in *England*," or of any orders
made in pursuance of the said act, any general order
of the Court shall have become inapplicable to the
offices and practice of the Court, as established by and
in pursuance of the said act, such general order shall
be interpreted as if the same were amended, and the
directions therein contained were made consistent with
the said act of Parliament, and the orders made in pur-
suance thereof; and that the Registrars of the Court
and the Secretaries of the Master of the Rolls shall, in
drawing up all Orders, adapt the language thereof to
the alterations made in the practice of the Court by the
said act of Parliament and the Orders made in pur-
suance thereof.

FEES.

ORDERS IN CHANCERY.

XXXV

FEES.

1842.

XXXII.

Fees.

THAT the fees set forth in the First Schedule hereto shall be received and taken by the Clerk of the Inrolments in Chancery, and his clerks, in addition to the fees and sums of money mentioned in the Second Order. That the fees set forth in the Second Schedule hereto shall be received and taken by the Clerks of Records and Writs, and their clerks. That the fees set forth in the Third Schedule hereto shall be received and taken by the Taxing Masters, and their clerks. That the fees set forth in the Fourth Schedule hereto shall be received and taken by the Clerk of Affidavits, and his clerk. That the fee set forth in the Fifth Schedule hereto shall be received and taken by the Clerks to the Masters in Ordinary, in addition to the other fees received and taken by them. And that the fees set forth in the Sixth Schedule hereto shall be received and taken by solicitors for their own use, in addition to the other fees received and taken by them. And that the Clerks of Records and Writs, and the Taxing Masters respectively, may require any of the said fees payable to them respectively to be paid in advance, or may require a deposit to be paid on account thereof.

Of Clerk of Inrolments;

of Clerks of Records and Writs;
of Taxing Masters;

of Clerk of Affidavits;

of Clerks of Masters in Ordinary;

Payment in advance, or deposit, may be required.

XXXIII.

THAT all the fees which are hereby authorised to be received by the Clerk of the Inrolments in Chancery, the Clerks of Records and Writs, the Taxing Masters, the Clerk of the Affidavits, and the Clerks of the Masters in Ordinary, shall be by them severally and respectively paid into the Bank of *England*, in the name of the Accountant-General, to be placed to the credit of the account intituled "The Suitors' Fee Fund Account."

Fees to be carried to Fee Fund account.

1842.

XXXIY.

Orders to take
effect from
28th October,
1842.

THAT the foregoing Orders shall take effect from and
after the 28th day of October, 1842.

THE FIRST SCHEDULE

ABOVE REFERRED TO.

Fees to be taken by the Clerk of Inrolments in Chancery and his Clerks.

	£	s.	d.
For the acknowledgment of every deed for each party	0	6	0
For the acknowledgment of every specification for each party	0	2	6
For every oath, affirmation, or attestation upon honour	0	1	6

THE SECOND SCHEDULE

ABOVE REFERRED TO.

Fees to be taken by the Clerks of Records and Writs and their Clerks.

Sealing every dedimus to take an answer	0	10	0
Sealing every special dedimus by order of Court	0	18	0
Sealing special injunction	1	10	0
Sealing an attachment or distringas for not appearing or answering	0	8	0
Sealing every other writ	1	0	0
Resealing any writ on any alteration thereof	0	3	0
Filing every bill or information	1	0	0
Filing replication	0	10	0
Entering appearance for any defendant appearing separately	0	7	0
Entering appearance if not more than three defendants	0	7	0
If more than three and not exceeding six defendants	0	14	0
And in the same proportion for any number of defendants.			
Office copies of documents left for inspection as exhibits,			
per folio	0	0	4
All other office copies, per folio	0	0	10
Filing plea, answer, or demurrer	0	10	0
Entering a rule	0	8	0
Attending Court of Chancery, or Master with record,			
per diem	0	14	0
Attending			

ORDERS IN CHANCERY.

xxxvii

1842.

	£	s.	d.
Attending Court of Chancery, or Master with exhibits, per diem, exclusive of carriage or portorage, when required	0	14	0
Attending with record or exhibits in any other court or place (besides expenses to be retained by the officer to his own use), per diem	-	-	-
Every consent	0	7	0
Every certificate	0	4	0
Examining all copies with the records, per folio	0	0	2
Every exemplification, per skin, exclusive of parchment and duty	1	14	0
On inspection of documents left with the Clerk of Records and Writs, per hour	0	7	0
Amending every record, if amendments under ten folios	0	14	0
If more than ten folios, for every folio over	0	0	6
Amending every office copy, if amendments under ten folios	0	7	0
If more than ten folios, for every folio over	0	0	4
Setting down cause besides certificate	1	1	0
Search for records when in the record room, or for any person not being a party in the cause, first year	0	2	0
Each year after	0	1	0
Inspection of same	0	7	0
Filing every note	0	7	0
Entering memorandum of service of copy bill on every defendant	0	7	0
Every oath, affirmation, or attestation upon honour	0	1	6
Every exhibit to affidavit, &c.	0	2	6
Inrolling decree or order, the same fees as heretofore until further order.			

THE THIRD SCHEDULE

ABOVE REFERRED TO.

Fees to be taken by the Taxing Masters and their Clerks.

For every warrant	0	3	0
For drawing every report, per folio, exclusive of the following fee	0	1	0
On signing every report and certificate	1	0	0
Per-centage on amount of every bill of costs as taxed	4	0	0
For copies of bills of costs and other documents, per folio	0	0	4
For every oath, affirmation, or attestation upon honour	0	1	6
For every exhibit	0	2	6

c 3

For

1842.



	£	s.	d.
For signing the allowance to every set of interrogatories, account, or other document	-	-	- 0 5 0
For an examination fee on each witness exclusive of oath	0	5	0

THE FOURTH SCHEDULE

ABOVE REFERRED TO.

Fees to be taken by the Clerk of Affidavits.

For every affidavit	-	-	-	-	-	0	1	6
For every exhibit	-	-	-	-	-	0	2	6

THE FIFTH SCHEDULE

ABOVE REFERRED TO.

Fee to be taken by the Clerks of the Masters in Ordinary.

For copies, in addition to the sum of one penny halfpenny now taken and received, the further sum of, per folio	0	0	2½
--	---	---	----

THE SIXTH SCHEDULE

ABOVE REFERRED TO.

Fees to be taken and received by Solicitors.

For preparing every writ without order	-	-	0	6	8
Ditto, every writ under order, except special injunction	0	13	4		
Ditto, special injunction, including engrossment and docket, per folio	-	-	-	-	0 1 4
Parchment as paid	-	-	-	-	0 0 0

LYNDHURST, C.
LANGDALE, M. R.
LANCELOT SHADWELL, V. C. E.
JAMES WIGRAM, V. C.

1842.



ORDERS IN LUNACY.

27th October, 1842.

I, JOHN SINGLETON Baron LYNDHURST, Lord High Chancellor of Great Britain, intrusted, by virtue of her Majesty's sign manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind, do, in pursuance of an act of parliament passed in the sixth year of the reign of her present Majesty, intituled "An Act to alter and amend the Practice and Course of Proceeding under Commissions in the Nature of Writs *de lunatico inquirendo*," and for the purpose of making immediate provision for carrying the same into effect, hereby order and direct in manner following; that is to say, —

I.

THAT from and after the first day of *Michaelmas* term next the office of Clerk of the Custodies of Idiots and Lunatics do cease and determine.

Office of Clerk of Custodies abolished.

II.

THAT all the inquiries and matters connected with the persons and estates of lunatics heretofore usually referred to the Masters in Ordinary of the High Court of Chancery, (*except* inquiries under or by virtue of an act made and passed in the first year of the reign of his Majesty King *William* the *Fourth*, intituled "An Act for amending the Laws respecting Conveyances and

References in lunacy, except in certain cases, to be made to Commissioners instead of to Masters.

ORDERS IN CHANCERY.

Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give Effect to their Decrees and Orders in certain Cases," and also *except* where the Lord Chancellor shall from time to time otherwise specially direct,) be hereafter referred to the Commissioners in Lunacy for the time being.

III.

THAT all inquiries in lunacy now pending before any of the said Masters (*except* any inquiries under or by virtue of the said act of Parliament in the last Order mentioned, and *except* where otherwise hereafter specially directed,) be transferred to the Commissioners in Lunacy.

IV.

THAT all deeds, wills, securities, papers, and documents, in any lunacy, now left or deposited in the offices of the said Masters respectively, be delivered to the Commissioners in Lunacy, or to some person by them authorised to receive the same.

V.

THAT until further order, the clerks to the Commissioners take and receive for business done in the Commissioners' Office the like fees to those for the time being receivable by the clerks to the said Masters for the like business, such fees to be accounted for as hereinafter mentioned.

VI.

THAT until further order, all acts, deeds, matters, and things heretofore accustomed to be done in the execution of the office of Clerk of the Custodies, as to the several matters following, be done by the Commissioners in Lunacy; that is to say, —

Bonds

Bonds and recognisances of committees and their sureties, and the vacating and delivering up the same ;

1842.

The bill for the grant of the custody, and for the revocation thereof ;

Summoning committees and sureties to account ;

Filing and copying committees' accounts, and certifying the same.

VII.

THAT until further order, the clerks of the Commissioners take and receive for the business so done under the foregoing Order the like fees to those heretofore received in the office of Clerk of the Custodies for the like business, such fees to be accounted for as hereinafter mentioned.

Fees of Commissioners' clerks for such duties.

VIII.

THAT until further order, all other acts, deeds, matters, and things, heretofore accustomed to be done in the execution of the office of Clerk of the Custodies, be (so far as according to the practice for the time being in lunacy the same shall be necessary to be performed) done by the Secretary of Lunatics ; and the Secretary of Lunatics is to take and receive for the business so done the like fees to those heretofore received in the office of Clerk of the Custodies for the like business, such fees to be accounted for as hereinafter mentioned.

All other duties of Clerk of Custodies, transferred to Secretary of Lunatics.

Fees.

IX.

THAT the matter of each lunacy be, for the purpose of the inquiries hereby authorised, considered as referred to the Commissioners in Lunacy from the date of the inquisition.

Matter of each lunacy to be considered as referred from date of inquisition.

X.

THAT where any person has been or may be found lunatic under any commission, the Commissioner do, from

Special orders dispensed with for the following pur-

1842.

poses: —
for inquiries
as to heir at
law and next
of kin;

as to situation
and fortune of
lunatic, and
appointment
of committee;

as to past and
future main-
tenance;

from time to time, and without any special order in such matter, inquire and report who is or are the heir or heirs at law and next of kin of the lunatic, and the person or persons who would be entitled to his estate or to shares thereof under the statutes for the distribution of intestates' estates, in case he were, at the date of such inquiry, dead intestate, to whom due notice of attending the Commissioner is to be given; and also inquire and report what is the situation of the lunatic and the nature of the lunacy, and who is or are the most fit and proper person or persons to be appointed the committee or committees of the person and estate of the lunatic, and of what the fortune of the lunatic did, at the time from which he shall have been found lunatic, consist, and of what it consists at the time of such inquiry, and what is the amount of income arising therefrom, and in what manner, and at what expense, and by whom and where the lunatic has been maintained, and whether any thing and what is due, and to whom, in respect of such past maintenance, and to whom, and out of what fund the same ought to be paid, and what is fit and proper to be allowed for the maintenance and support of the lunatic for the time past and to come, regard being had to the circumstances and estate of the lunatic, and from what time such allowance should commence.

XI.

as to pro-
visional care
and manage-
ment.

THAT the Commissioner be at liberty immediately after inquisition, and without any special order in the matter, to make inquiry, and to report, whenever it shall seem necessary, upon the provisional care and management of the lunatic and his property, and as to maintenance, until committees or a committee be appointed.

XII. THAT

ORDERS IN CHANCERY.

xliii

XII.

1842.

THAT the Commissioner be at liberty, by certificate under his hand, and without any special order for that purpose, to enlarge, from time to time, the period within which any person approved of as committee of the estate of any lunatic ought to complete his security.

For enlarge-
ment of time
for committee
to complete
security.

XIII.

THAT the Commissioner be at liberty, without special order, to receive any proposal or conduct any inquiry as to the managing, setting or letting the estate, or otherwise respecting the person or property of any lunatic, and may report thereon as he shall see fit; but such report shall be submitted for confirmation, as is now done with respect to such reports when made upon special reference.

For inquiry as
to managing,
setting, and
letting estate.

XIV.

THAT it shall not be necessary for the committee, or the legal personal representatives of the committee, to obtain a special order in the matter for the taking and passing, from time to time, his or their accounts, but such committee or his legal personal representatives, as the case may be, do, from time to time, without any special order in the lunacy for that purpose, attend before the Commissioner, and have an account of his or their receipts and payments for and on account of the lunatic and his estate taken and passed; and that in taking and passing such accounts, the Commissioner make unto the committee, or his legal personal representatives, as the case may be, all just allowances, including an allowance of his and their reasonable and proper costs, charges, and expenses, and those of the next of kin of the lunatic, of passing such accounts.

For passing
committee's
accounts.

XV. THAT

1842.

Commissioner
may deter-
mine what
next of kin or
heirs of lunatic
are to attend
proceedings;

THAT the Commissioner may from time to time determine whether all, or how many, and which of the next of kin or of the heirs of the lunatic, shall (unless at their own costs) attend before him on any proceedings in the lunacy; and that no other of such parties shall be allowed costs out of the estate, unless by special order for that purpose.

XVI.

and may make
separate re-
ports and state
special cir-
cumstances.

THAT the Commissioner be at liberty, from time to time, and at the request of any party or otherwise, to make separate reports, or a separate report, and to state any circumstances as to the subject-matter of the report specially, as he shall think fit.

XVII.

Orders to re-
cite only the
prayer of pe-
titions and the
finding of
reports.

Petition to be
filed before
order passed.

THAT for the purpose of avoiding, as much as may be, expense and delay in drawing orders in lunacy, no part of the statements in the petition be recited in any order, but only the prayer; and that no part of the Commissioner's report be stated in any order except the Commissioner's finding or opinion; and that before any order be passed, the original petition or petitions be filed with the Secretary of Lunatics.

XVIII.

Fees to Secre-
tary of Lu-
natics.

THAT until further order, the fees hereinafter mentioned for the matters following be taken and received by the Secretary of Lunatics, in lieu of the fees now taken and received by him for such matters respectively; viz. — For every order £2 10s. For every duplicate of an order, requiring to be drawn up in Chancery, 10s. For filing every petition, 10s.; such fees to be accounted for as hereinafter mentioned.

XIX. THAT


ORDERS IN CHANCERY.

xlv

XIX.

1842.

THAT all fees taken and received by the clerks to the Commissioners, and by the Secretary of Lunatics, be, once in every month, paid into the Bank of *England* to the credit of the Accountant-General of the Court of Chancery, to the account intituled "The Suitors' Fee Fund Account;" the amount thereof to be verified by affidavit.


All fees to be
carried to Fee
Fund Account.

XX.

THAT the foregoing Orders take effect on the first day of *Michaelmas* term next.

Orders to take
effect from
first day of
Michaelmas
term, 1842.

LYNDHURST, C.

1843.

ORDER OF COURT.

Friday, 17th March, 1843.

The Right Honourable JOHN SINGLETON, LORD LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY, LORD LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, the Vice-Chancellor of England, the Right Honourable the Vice-Chancellor, Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor, Sir JAMES WIGRAM, doth hereby order and direct in manner following; (that is to say,)

I.

THAT for the purpose of diminishing expense in the Inrolment of Decrees and Orders, no part of the statements or allegations contained in any Bill, Answer, Petition, Affidavit, or Report, shall be recited or stated in any such Inrolment, but that it shall be sufficient to state in such Inrolment the filing of the Bill or Petition, or service of the Notice of Motion, the names of the parties thereto, together with the prayer of the Bill or Petition, or Notice of Motion, the filing of the several answers, and other Pleadings or Proceedings and Reports, whether confirmed or not, and the short purport or effect of any Decree or Order made, had, put in, or taken, before the date of the Decree or Order inrolled and leading thereto.

Order for
shortening
Inrolments of
Decrees and
Orders.

1843.

No Inrolment
to be made
until the
docquet has
been inspected
and its cor-
rectness cer-
tified by Clerk
of Records.

Fee.

II.

THAT no Decree or Order shall be inrolled until the Clerk of Record and Writs, in whose division the Cause or Matter may be shall have inspected the Docquet of such Inrolment, and shall have certified thereon that the statement of the Pleadings, Orders, Reports, and Proceedings therein contained is correct, and that for such inspection and Certificate, the Clerk of Records and Writs shall be entitled to receive, and he is hereby authorized to receive the sum of five pounds, to be by him paid into the Suitors' Fee Fund.

LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

JAMES LEWIS KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

1844.

ORDER OF COURT.

Friday, 22d March, 1844.

THE Right Honourable JOHN SINGLETON, Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fifth and sixth years of the reign of her present Majesty, intituled “An act for abolishing certain offices in the High Court of Chancery,” and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following (that is to say):

I.


THAT the Clerks of Records and Writs and their clerks, shall, in lieu and instead of the fee of 10*d.* per folio for all office copies of documents (other than office copies of documents left for inspection as exhibits) mentioned in the second schedule (a) to the Order of Court of the 26th day of *October* 1842, receive and take for all such

Fees of Clerks
of Records for
Office copies
reduced from
10*d.* to 8*d.* per
folio. }

(a) *Suprà*, p. xxxvi.

d 2

ORDERS IN CHANCERY.

1844.


such office copies, bespoke after the 23d day of *March* instant, a fee of 8*d.* per folio, and no more.

II.

THAT this order be entered with the Registrar of the High Court of Chancery.

LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

1844.

ORDER OF COURT.

Monday, 15th April, 1844.

THE Right Honourable JOHN SINGLETON, Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fifth and sixth years of the reign of her present Majesty, intituled “An act for abolishing certain Offices in the High Court of Chancery in England,” and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following (that is to say):

I.

THAT the Examiners of the High Court of Chancery shall, in lieu and instead of the fee of 14*d.* per folio, receivable by them for all office copies of interrogatories, depositions, or other documents, receive and take for all such office copies, bespoke after the 16th day of *April* instant, a fee of 8*d.*, and no more.

Examiners' fees for office copies reduced from 14*d.* to 8*d.* per folio.

II. THAT

1844.



II.

THAT this order be entered with the Registrar of the High Court of Chancery.

(Signed) LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

1844.

ORDER IN LUNACY.

15th *April*, 1844.

WHEREAS it is important to enforce the passing of the Accounts of the Committees and Receivers of Lunatics' Estates, and the Payment of the Balances due thereon: and whereas the Estates of Lunatics may be placed in jeopardy, by reason of the Sureties for the Committees and Receivers dying, or being declared Bankrupt or Insolvent: —

IT IS ORDERED, That the Commissioners in Lunacy shall jointly or severally, from time to time, fix the times within which all Committees and Receivers in the matters in their offices, shall, annually or at such longer or shorter periods as may to such Commissioners or Commissioner seem proper, procure their accounts to be delivered into the Commissioners' Office; and that all Committees and Receivers shall, after their accounts shall have been delivered into the Commissioners' Office as aforesaid, procure them to be proceeded on, examined, and settled, at or within such times as the Commissioners may jointly or severally, from time to time, direct; and that the Commissioners shall, jointly or severally, also fix the times within which such Committees and Receivers shall pay the balances which shall appear due on passing such accounts, or such parts thereof as the Commissioners, jointly or severally, shall certify to be proper to be paid by such Committees and Receivers; and also, when it shall to such Commissioners or Commissioner seem proper, the times within which such Committees and Receivers shall cause to be laid out such balances, and any sum of dividends or cash at the Bank, to which the lunatics respectively may be then entitled.

Commissioners shall jointly or severally fix times within which Committees and Receivers are to deliver in and pass the accounts, and pay and lay out balances.

AND

1844.

And, in case of their default, shall disallow their salaries, and charge them with interest at 5% per cent.

AND IT IS HEREBY FURTHER ORDERED, with respect to such Committees and Receivers as shall make default in any of the matters aforesaid, that the Commissioners shall jointly or severally, from time to time, if good cause be not shewn to such Commissioners or Commissioner to the contrary, not only disallow the salaries (if any) claimed by such Committees or Receivers, or their representatives, but also charge them with interest after the rate of 5% per cent. per annum upon any balances, dividends, or cash, during the time the same respectively shall appear to have improperly remained in hand, or uninvested, as the case may be.

And where their sureties are dead or insolvent, shall fix a time for their giving new security.

AND IT IS HEREBY FURTHER ORDERED, That every Committee and Receiver in any matter in lunacy shall, on each occasion of passing his accounts, or at such other times as the Commissioners may jointly or severally appoint in that behalf, satisfy the Commissioners or Commissioner, by affidavit or otherwise, that the sureties of such Committee or Receiver are living, and have not been declared bankrupt or insolvent; and if it shall appear to the Commissioners or Commissioner, that any surety of such Committee or Receiver is not living, or has been declared bankrupt or insolvent, then that such Commissioners shall jointly, or severally, fix the time within which such Committee or Receiver shall enter into fresh security as Committee or Receiver of the estate of such lunatic; and that in default of his doing so, the Commissioners shall jointly or severally (without special order), inquire and report who is or are the most fit and proper person or persons to be appointed Committee or Committees, or Receiver, of the estate of such lunatic, in the place of such Committee or Receiver so making default.

And, in case of their default, shall without special order, enquire and report who are proper persons to be appointed in their place.

AND

ORDER IN LUNACY.

lv

AND IT IS HEREBY FURTHER ORDERED, That in case any Committee or Receiver shall, at any time, make default in any of the matters aforesaid, the Commissioners or Commissioner, when it shall to them or him seem proper, shall certify the same accordingly.

1844.

Commissioners may certify default.

AND IT IS HEREBY ORDERED, That this Order be entered with the Secretary of Lunatics, and that a copy of it be fixed up in the office of the Secretary of Lunatics and Commissioners in Lunacy.

LYNDHURST C

ERRATA IN PART I.

Page 36. line 7., for “ *September* ” read “ *March.* ”
129. line 4., *dele* “ with costs. ”

ERRATUM IN PART II.

Page 336. line 9. from bottom, for “ the plea of *non tenure* ” read “ plea or demurrer. ”

ORDERS IN CHANCERY.

lv

AND IT IS HEREBY FURTHER ORDERED, That in case any Committee or Receiver shall, at any time, make default in any of the matters aforesaid, the Commissioners or Commissioner, when it shall to them or him seem proper, shall certify the same accordingly.

1845.

Commissioners may certify default.

AND IT IS HEREBY ORDERED, That this Order be entered with the Secretary of Lunatics, and that a copy of it be fixed up in the office of the Secretary of Lunatics and Commissioners in Lunacy.

LYNDHURST C.

1844.



ORDER OF COURT.

21st *June*, 1844.

Record and
writ clerks'
fees for office
copies re-
duced from
8*d.* to 6*d.* per
folio.

I. THAT, for all office copies bespoke after the 22d day of *June* instant, the clerks of records and writs and their clerks shall, in lieu and instead of the fee of 8*d.* per folio, receivable by them under the Order of Court, dated the 22d day of *March* last, receive and take the fee of 6*d.* per folio, and no more.

Ditto, ex-
aminers' fees.

II. THAT, for all office copies bespoke after the 22d day of *June* instant, the examiners of the High Court of Chancery and their clerks, shall, in lieu of the fee of 8*d.* per folio, receivable by them under the Order of Court dated the 15th day of *April* last, receive and take the fee of 6*d.* per folio, and no more.

That this Order be entered with the registrar of the High Court of Chancery.

(Signed)

LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

ORDERS IN CHANCERY.

lvii

1844.



ORDER OF COURT.

13th *November*, 1844.

I. THAT for all office copies bespoke after the 14th day of *November* instant, the clerks of records and writs shall, in lieu and instead of the fee of 6*d.* per folio, receivable by them under the Order of Court, dated the 21st day of *June* last, receive and take the fee of 4*d.* per folio, and no more.

Record and writ clerk's fees for office copies reduced from 6*d.* to 4*d.* per folio.

II. THAT for all office copies bespoke after the 14th day of *November* instant, the examiners of the High Court of Chancery and their clerks, shall, in lieu and instead of the fee of 6*d.* per folio, receivable by them under the Order of Court, dated the 21st day of *June* last, receive and take the fee of 4*d.* per folio, and no more.

Ditto, examiners' fees.

That this Order be entered with the Registrar of the High Court of Chancery.

(Signed) **LYNDHURST, C.**
 LANGDALE, M. R.
 LANCELOT SHADWELL, V.C.E.
 J. L. KNIGHT BRUCE, V.C.
 JAMES WIGRAM, V.C.

1844.

ORDER OF COURT.

6th *December*, 1844.

Solicitor of
suits' fund
to have notice
of applications
under the
1 *W. 4. c. 36.*
for discharge
of prisoners in
contempt and
for payment
of costs out
of suits' fund.

THAT in every case in which application shall be intended to made for the discharge of any prisoner in contempt, and for the payment out of the suits' fund of the costs of such contempt, in pursuance of the provisions for that purpose contained in an Act of the first year of the reign of his late Majesty King *William* the Fourth, intituled "An Act for altering and amending the law regarding commitments by courts of equity for contempts, and the taking of bills, *pro confesso*," notice in writing of such intended application shall be served upon the solicitor to the suits' fund two clear days at the least before the day upon which the application is intended to be made. •

And also of
proceedings
before Master,
under refer-
ence as to the
poverty of
such prisoners.

THAT in every case in which a reference to the Master under the said act shall be directed to inquire into the fact of the poverty of any prisoner in contempt, notice in writing of the order of reference, and of every warrant to proceed thereupon before the Master, shall be duly served upon the solicitor to the suits' fund.

(Signed)

LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

1845.

ORDER OF COURT.

12th *February*, 1845.

THAT the Taxing Masters and their clerks shall, in lieu and instead of the fee of 4*l.*, for per centage on the amount of every bill of costs as taxed, mentioned in the third schedule to the Order of Court of the 26th day of *October* 1842, receive and take the fee of 3*l.* for such per centage and no more, upon all bills of costs brought in for taxation after the 13th day of *February* instant.

Per centage
fee for tax-
ation of costs
reduced from
4*l.* to 3*l.*

That this Order be entered with the Registrar of the High Court of Chancery.

(Signed) LYNDHURST, C.
 LANGDALE, M. R.
 LANCELOT SHADWELL, V. C. E.
 J. L. KNIGHT BRUCE, V. C.
 JAMES WIGRAM, V. C.

1845.

ORDER OF COURT.

8th *May*, 1845.

THE Right Honourable JOHN SINGLETON, Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby, in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, intituled “An act for facilitating the administration of justice in the Court of Chancery,” and of an act passed in the fourth and fifth years of the reign of Her present Majesty, intituled “An act to amend an act of the fourth year of the reign of Her present Majesty, intituled ‘An act for facilitating the administration of justice in the Court of Chancery,’ ” and in pursuance and execution of all other powers enabling him in that behalf, order and direct that all and every the rules, orders, and directions herein-after set forth, shall henceforth be, and for all purposes be deemed and taken to be, General Orders and Rules of the High Court of Chancery, viz.

Introductory.

Repeal of certain orders wholly or in part.

I. The several Orders comprised in the General Order of the 3d of *April* 1828, which are respectively numbered

bered 1, 2, 3, 4, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 31, 37, and 38, and the amendments made by the General Order of the 23d day of *November* 1831, in such of the same Orders as are respectively numbered 6, 13, 16, 17, 18, and 19, and also the General Order of the 3d day of *April* 1830, and also the several Orders comprised in the General Order of the 21st of *December* 1833 which are respectively numbered 1, 7, 8, 10, 12, 13, 14, 18, 21, 22, 26, 34, 35, and 36, and the several Orders comprised in the General Order of the 9th of *May* 1839 which are respectively numbered 1 and 2, and the several Orders comprised in the General Order of the 26th of *August* 1841 which are respectively numbered 1, 2, 3, 4, 5, 8, 14, 20, 21, 22, 33, 34, and 35, and the several Orders comprised in the General Order of the 11th of *April* 1842 which are respectively numbered 1, 2, 4, and 5, and all other Orders and parts of Orders, so far as such other Orders and parts of Orders are inconsistent with these Orders, but not further or otherwise, are hereby abrogated and discharged.

1845.

II. All former Orders and parts of Orders not specified in Order I., so far as the same are now in force, and consistent with these Orders, are to remain in full force and effect.

Subject thereto all existing orders to remain in force.

When the Orders are to come into Operation.

III. These Orders are, as to all suits now depending or hereafter to be commenced, to take effect on the 28th day of *October* 1845.

These Orders to take effect 28th *October* 1845.

Interpretation.

IV. In these Orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction ; viz. —

Interpretation.

1845.

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word person or party includes a body politic or corporate.
4. The word bill includes information.
5. The word plaintiff includes informant.

Official Attendance and Vacations.

Days when
offices may be
closed, of

V. The several offices of the Court, except the offices of the Accountant-General and of the Masters in ordinary and Taxing Masters, are to be open on every day of the year, except

Sundays,

Good Friday,

Monday and Tuesday in Easter Week,

Christmas Day, — and —

All days appointed by proclamation to be observed as days of general fast or thanksgiving.

Accountant-
General,
Masters,
Taxing
Masters,

VI. The offices of the Accountant-General, and of the Masters in ordinary and Taxing Masters, are to be open on every day of the year, except the days specified in Order V., and except during vacations.

Master, and
Taxing Mas-
ter, of Vaca-
tion.

VII. The offices of the vacation Master in ordinary, and of the vacation Taxing Master, are to be open during the vacations on every day except the days specified in Order V.

Vacations.

VIII. The vacations to be observed in the several offices of the Court, except in the office of the Accountant-General, are to be four in every year, viz. the

Easter

ORDERS IN CHANCERY.

lxiii

Easter vacation, the *Whitsun* vacation, the long vacation, and the *Christmas* vacation ; and —

1845.

1. The *Easter* Vacation is to commence and terminate on such days as the Lord Chancellor shall every year specially direct ; Easter.
2. The *Whitsun* Vacation is to commence on the third day after *Easter* Term, and to terminate on the second day before *Trinity* Term in every year ; Whitsun.
3. The Long Vacation is to commence on the 10th day of *August*, and terminate on the 28th day of *October* in every year ; Long.
4. The *Christmas* Vacation is to commence on the 24th day of *December* in every year, and terminate on the 6th day of the following month of *January* ; and Christmas.
5. The days of the commencement and termination of each vacation are to be included in and reckoned part of such vacation.

IX. The vacations in the office of the Accountant-General are to be the same as in the other offices, except as to the Long Vacation, which, in that office, is to commence and terminate on such days as the Lord Chancellor shall every year direct. Long Vacation of Accountant-General to be regulated by Lord Chancellor.

X. The Lord Chancellor may from time to time, by special order, direct the offices to be closed on days other than those mentioned in Order V., and direct any of the vacations to commence and terminate on days different from the fixed days mentioned in Order VIII. Lord Chancellor may alter duration of vacations and days of closing offices.

Computation of Time.

XI. When any limited time from or after any date or event is appointed or allowed for doing any act or taking any Time allowed for acts or proceedings, how computed.

1845.

any proceeding, the computation of such limited time is not to include the day of such date or of the happening of such event, but is to commence at the beginning of the next following day ; and the act or proceeding is to be done or taken at the latest on the last day of such limited time according to such computation.

Month means
lunar month.

XII. When the time for doing any act or taking any proceeding is limited by months not expressed to be calendar months, such time is to be computed by lunar months of twenty-eight days each.

Sunday or
other holiday
not counted,
when the last
day.

XIII. When the time for doing any act or taking any proceeding expires on a *Sunday* or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding is, so far as regards the time of doing or taking the same, to be held to be duly done or taken if done or taken on the day on which the offices shall next open.

Purposes for
which vaca-
tions are not
to be reck-
oned.

XIV. The times of vacation are not to be reckoned in the computation of the times appointed or allowed for the following purposes ;

1. Amending or obtaining orders for leave to amend bills.
2. Filing or referring exceptions, or obtaining a master's report on exceptions, in cases where the time is not limited by the order of reference, or by notice given pursuant to Article 21. of Order XVI.
3. Setting down pleas, demurrers, or objections for want of parties.
4. Filing replications, or setting down causes under the directions of Article 41. of Order XVI.

XV. The

XV. The day on which an order that the Plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, is not to be reckoned in the computation of time allowed a Defendant to plead, answer, or demur.

1845.

Service of order on Plaintiff to give security for costs prevents time from running till obeyed.

Times allowed in procedure.

XVI. The times of procedure are to be the same in town causes and country causes; and in the cases hereinafter mentioned are to be as follow : —

Times allowed in all causes.

1. The service of any subpoena, except a subpoena for costs, is to be of no validity if not made within twelve weeks after the teste of the writ.

For service of subpoena.

2. The service of a copy of a bill upon a Defendant under the 23d of the Orders of the 26th August 1841 is to be of no validity if not made within twelve weeks from the filing of such bill, unless the Court shall give leave for such service to be made after the expiration of such twelve weeks.

For service of copy bill.

3. If a Defendant be served with a subpoena to appear to or to appear to and answer a bill, he is to appear thereto within eight days after the service of such subpoena.

For appearance.

If he does not, he becomes subject to the following liabilities : —

Consequences of default.

1. An attachment may be issued against him.

2. An appearance may be entered for him on the application of the Plaintiff.

3. If the bill prays for an injunction to stay proceedings at law, the Plaintiff may obtain an order for the common injunction, if no injunction has been previously obtained.

4. In

1845.

For entering
of appearance
by record and
writ clerk.

For entering
appearance
where De-
fendant served
with copy bill.

For referring
exceptions for
scandal or
impertinence.

For obtaining
report there-
on.

4. In cases where a subpoena has been served in the manner specified by Order XXIX., and a Defendant is in default for want of appearance, the Plaintiff may, within three weeks after such service, cause an appearance to be entered for such Defendant by a record and writ clerk, without special order.

5. A Defendant, served with a copy of a bill under the 23d of the Orders of the 26th *August* 1841, may, within twelve days after such service, enter a common or special appearance under the 26th or 27th of the same Orders.

If he does not do so, he cannot afterwards enter either a common or special appearance without leave of the Court; and he is bound by the proceedings in the cause, unless the Court otherwise directs.

6. Any person or party having filed exceptions to any pleading or other matter depending before the Court for scandal, and any party having filed exceptions for impertinence, is to obtain an order to refer the same to the Master within six days after the filing thereof.

If he does not, the exceptions are to be considered as abandoned, and the costs are to be paid by the exceptant.

7. Any person or party having obtained an order to refer exceptions to the Master for scandal, and any party having obtained an order to refer exceptions to the Master for impertinence, is to obtain the Master's report thereon within fourteen days after the date of the order, or within such further time as the Master thinks fit to allow.

If he does not, the order is to be considered as abandoned, and the costs are to be paid by the exceptant.

8. Any

8. Any person or party objecting to the Master's report that any pleading or other matter referred to him is scandalous, and any party objecting to the Master's report that any pleading or other matter referred to him is impertinent, has four days after the filing of the report, within which he may file and set down exceptions thereto and serve the order for setting down the same, before the scandal or impertinence is expunged.

1845.

For taking exceptions to such report.

If he does not do so, the scandalous or impertinent matter is to be expunged.

9. Any person or party objecting to the Master's report that any pleading or other matter referred to him is not scandalous, and any party objecting to the Master's report that any pleading or other matter referred to him is not impertinent, has four days after the filing of the report, within which he may file and set down exceptions thereto, and serve the order for setting down the same.

10. A Defendant may demur alone to any bill within twelve days after his appearance thereto, but not afterwards.

For demurring alone.

11. A Defendant desiring to avoid the common injunction for default of answer has for that purpose only eight days after appearance, within which he is to plead, answer, or demur to a bill praying an injunction to stay proceedings at law.

For answering so as to avoid common injunction.

If he does not plead, answer, or demur within such eight days, the Plaintiff is entitled as of course, and without an attachment, to the common injunction.

12. A Defendant who has appeared in person or by his own solicitor, and desires to shew cause against an order to revive being made, has for that purpose only eight days after such appearance,

For shewing cause against order to revive.

1845.



For answering
original or
supplemental
bill.

Consequences
of default.

For answering
a bill amended
before answer.

Consequences
of default.

ance, within which he is to plead or demur to a bill of revivor.

If he does not plead or demur within such eight days, the Plaintiff is entitled as of course to the common order to revive.

13. A Defendant is to plead, answer, or demur, not demurring alone, to any original or supplemental bill, within six weeks after appearance thereto has been entered by or for him.

If he does not, and if he procures no enlargement of the time allowed, he is subject to the following liabilities : —

1. An attachment may be issued against him ;
2. He may be committed to prison, and brought to the bar of the Court ; and,
3. The Plaintiff may file a traversing note, or proceed to have the bill taken *pro confesso* against him.

14. If the Plaintiff amends his bill under an order for leave to amend obtained and served before answer, a Defendant is to plead, answer, or demur, not demurring alone, to such amended bill, within six weeks after he is served with notice of the amendment of such bill.

If he does not, and if he procures no enlargement of the time allowed, he is subject to the following liabilities : —

1. An attachment may be issued against him ;
2. He may be committed to prison, and brought to the bar of the Court ;
3. The Plaintiff may file a traversing note, or proceed to have the bill taken *pro confesso* against him.

15. If

15. If a Defendant is ordered to answer amendments and exceptions together, he is to put in his further answer and his answer to the amendments of the bill within four weeks after he is served with notice of the amendment of such bill.

1845.

For answering
amendments
and excep-
tions together.

If he does not, and if he procures no enlargement of the time allowed, he is subject to the following liabilities : —

1. An attachment may be issued against him ;
2. He may be committed to prison, and brought to the bar of the Court ;
3. The Plaintiff may file a traversing note, or proceed to take the bill *pro confesso* against him.

16. If a Defendant, having already answered, is served with a subpoena to appear to and answer an amended bill, he is to plead, answer, or demur, not demurring alone, to such amended bill, within four weeks, after an appearance thereto has been entered by or for him.

For answering
bill amended
after answer.

If he does not, and if he procures no enlargement of the time allowed, he is subject to the following liabilities : —

1. An attachment may be issued against him ;
2. He may be committed to prison, and brought to the bar of the Court ; and
3. The Plaintiff may file a traversing note, or proceed to have the bill taken *pro confesso* against him.

Consequences
of default.

17. Within twelve days after the filing of a demurrer to the whole bill, the Plaintiff desiring to submit such demurrer to the judgment of the Court is to cause the same to be set down for argument.

For setting
down general
demurrer.

If

1845.



For setting
down special
demurrer.

If he does not, such demurrer is to be held sufficient, and the Plaintiff is to be held to have submitted thereto.

18. Within three weeks after the filing of a demurrer to part of a bill, the Plaintiff desiring to submit such demurrer to the judgment of the Court is to cause the same to be set down for argument.

If he does not, such demurrer is to be held sufficient, and the Plaintiff is to be held to have submitted thereto.

For setting
down plea.

19. Within three weeks after the filing of a plea to the whole or part of a bill, the Plaintiff desiring to submit such plea to the judgment of the Court is to cause the same to be set down for argument.

If he does not, such plea is to be held good to the same extent and for the same purposes as a plea allowed upon argument, and the Plaintiff is to be held to have submitted thereto.

How soon a
Defendant
sued both at
law and in
equity may
obtain order
on Plaintiff to
elect.

20. A Defendant whose answer is not excepted to, or referred back on former exceptions, alleging that the Plaintiff is prosecuting him in this Court and also at law for the same matter, may, upon the expiration of eight days after his answer or further answer is filed, obtain as of course, on motion or petition, the usual order for the Plaintiff to make his election in which Court he will proceed.
21. A Defendant whose answer is excepted to, or referred back on former exceptions, alleging that the Plaintiff is prosecuting him in this Court and also at law for the same matter, may by notice in writing require the Plaintiff to procure the Master's Report upon the exceptions within four days from the service of the notice.

And

1845.

And if the Plaintiff does not obtain the Master's Report within such four days, such Defendant is entitled as of course, on motion or petition, to obtain the usual order for the Plaintiff to make his election in which Court he will proceed.

- 22.** After the filing of a Defendant's answer, the Plaintiff has six weeks within which he may file exceptions thereto for insufficiency. Time allowed to Plaintiff for excepting for insufficiency.
- If he does not file exceptions within six weeks, such answer on the expiration of the six weeks is to be deemed sufficient.
- 23.** A Defendant desiring to avoid a reference to the Master of exceptions to his answer for insufficiency, has for that purpose only eight days after the filing of such exceptions within which he may submit to the same before reference. To Defendant for submitting.
- 24.** If a Defendant, not being in contempt, submits to exceptions to his answer for insufficiency before the Plaintiff has obtained an order to refer the same to the Master, he is allowed three weeks from the date of the submission within which he is to put in his further answer to the bill. To Defendant who submits for putting in further answer.
- 25.** The Plaintiff, having filed exceptions for insufficiency to a Defendant's answer is not to procure an order to refer them to the Master before the expiration of eight days from the filing of such exceptions, unless in a case of election he is required by notice in writing from such Defendant to procure the Master's Report on such exceptions in four days, pursuant to article 21. of this Order. Time which Plaintiff must wait before he refers exceptions.
- 26.** The Plaintiff, having filed exceptions for insufficiency to a Defendant's answer, is to procure an order to refer them to the Master after the expiration of eight days but within fourteen days from the filing of such exceptions. Time within which he must refer them,

1845.

and obtain report thereon.

Do. where exceptions shewn as cause.

Time allowed to Plaintiff for referring further answer.

To Defendant for putting in further answer.

If he does not, the answer, on the expiration of such fourteen days, is to be deemed sufficient.

27. The Plaintiff, having obtained an order for referring to the Master exceptions to a Defendant's answer for insufficiency, or for referring back a Defendant's answer on former exceptions for insufficiency, is to obtain the Master's Report thereon within fourteen days from the date of the order, or within such further time as the Master shall allow.

If he does not, the answer, on the expiration of such fourteen days or further time, is to be deemed sufficient.

28. The Plaintiff, having shewn exceptions to a Defendant's answer for insufficiency as cause against dissolving an injunction, is to obtain the Master's Report thereon within four days after the date of the order to refer them.

If he does not, the injunction is dissolved.

29. After the filing of exceptions to a Defendant's answer for insufficiency, and any further answer put in, the Plaintiff has fourteen days from the filing of such further answer within which he may refer the answer back to the Master on the old exceptions.

The answer, if not referred back on the old exceptions within fourteen days after such further answer put in, is, on the expiration of such fourteen days, to be deemed sufficient.

30. If, after a reference of exceptions for insufficiency, or a reference back of the answer on the old exceptions, a Defendant, not being in contempt, submits to answer, or the Master finds the answer to be insufficient, the Master is in such cases

cases to appoint the time within which such Defendant is to put in his further answer.

1845.

If such Defendant does not obtain time from the Master, or does not answer within the time which the Master allows, the Plaintiff may sue out process of contempt against such Defendant.

- 31.** The answer of a Defendant is to be deemed sufficient,—
1. If no exception for insufficiency be filed thereto within six weeks after the filing of such answer. Answer, when to be deemed sufficient.
Where no exception filed.
 2. If (exceptions being filed) the Plaintiff does not, within fourteen days after the filing thereof, obtain an order to refer them. Where exceptions filed, but not duly referred.
 3. If (after obtaining such order) he does not obtain the Master's Report thereon within fourteen days from the date of the order, or within such further time as the Master may allow. Where referred, but no report thereon duly obtained.
 4. If he does not obtain an order to refer the answer back to the Master on the old exceptions within fourteen days after the filing of a further answer. Where further answer not duly referred back.
 5. If (after obtaining such order) he does not obtain the Master's Report thereon within fourteen days from the date of the order, or within such further time as the Master may allow. Where duly referred back, but no report duly obtained.
- 32.** In cases where there is a sole Defendant, or where, there being several Defendants they all join in the same answer, the Plaintiff may, after answer and before replication or undertaking to reply, obtain one order of course for leave to amend the bill, at any time within four weeks after the answer is deemed or found to be sufficient. Time allowed for obtaining order to amend bill,

Where but one answer.

1845.

Where several answers.

For amending pursuant to such order,

Where no injunction.

Where injunction has issued.

For answering amended bill praying injunction, so as to prevent injunction being obtained on affidavit.

3. In cases where there are several Defendants who do not join in the same answer, the Plaintiff (if not precluded from amending, or limited as to the time of amending by some former order) may, after answer and before replication or undertaking to reply, at any time within four weeks after the last answer is deemed or found to be sufficient, obtain one order of course for leave to amend his bill.

34. The Plaintiff, having obtained an order for leave to amend his bill, has, in all cases in which such order is not made without prejudice to an injunction, fourteen days after the date of the order within which he may amend such bill.

If such bill be not amended within such fourteen days, the order for leave to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.

35. The Plaintiff, having obtained an order for leave to amend his bill without prejudice to an injunction, must amend such bill within seven days from the date of the order.

If such bill be not amended within such seven days, the order for leave to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.

36. A Defendant, being served with subpoena to answer an amended bill praying an injunction to stay proceedings at law, and desiring to avoid a motion for an injunction on affidavit of the truth of the amendments, has, for that purpose, only eight days after appearance, within which he is to plead, answer, or demur to such amended bill.

37. The

37. The Plaintiff (not obtaining an order for leave to amend his bill) must either file his replication or set down the cause to be heard on bill and answer, within four weeks after the last answer is deemed or found to be sufficient.

1845.

For filing replication or setting down cause on bill and answer.

Otherwise any Defendant may move to dismiss the bill for want of prosecution.

38. If the Plaintiff amends his bill without requiring an answer to the amendments, any Defendant desiring to answer the same, must put in his answer thereto within eight days after being served with notice of the amendment of the bill, or within such further time as the Master may allow.

For answering amended bill not requiring an answer.

39. Where the Plaintiff amends his bill without requiring an answer to the amendments, and no answer is put in thereto, and no warrant for further time to answer the same is served within eight days after service of the notice of the amendment of such bill, the Plaintiff is, after the expiration of such eight days, but within fourteen days from the time of such service, either to file his replication, or to set down the cause to be heard upon bill and answer.

For filing replication or setting down &c., where bill has been amended without requiring an answer.

Otherwise any Defendant may move to dismiss the bill for want of prosecution.

40. Where the Plaintiff amends his bill without requiring an answer to the amendments, and a Defendant, within eight days after the service of the notice of the filing of the amended bill, serves a warrant for further time to answer the amendments, but the Master refuses to grant such further time, the Plaintiff is, within fourteen days after such refusal, either to file his replication or to set down the cause to be heard on bill and answer.

Where, after such amendment, Master refuses further time to answer.

1845.

Where, after such amendment, Defendant has put in a further answer.

Warrant to name commissioners not to be applied for till four days after replication.

Time allowed for examining witnesses.

When publication is to pass.

Time allowed for setting down cause.

Otherwise any Defendant may move to dismiss the bill for want of prosecution.

41. If a Defendant puts in an answer to amendments to which the Plaintiff has not required an answer, the Plaintiff must, within fourteen days after the filing of such answer, either file his replication or set down the cause to be heard on bill and answer, unless, in the mean time, he obtains from the Court a special order for leave to except to such answer or to amend the bill.

Otherwise any Defendant may move to dismiss the bill for want of prosecution.

42. Parties desiring to examine witnesses by commission, are not to apply for a warrant to name commissioners to examine witnesses, until after the expiration of four days from the filing of the replication.
43. After the replication is filed, parties have two months to examine their witnesses; and if such two months expire in the long vacation, the time, within which the parties are to examine their witnesses, is extended to the second day of the ensuing *Michaelmas* Term.
44. After the expiration of two months from the filing of the replication, publication is to pass, unless the time for publication has been enlarged, in which case it is to pass on the expiration of the enlarged time; but if the two months or the enlarged time expire in the long vacation, publication is not to pass till the second day of *Michaelmas* term; and on that day it is to pass, unless the time has been enlarged.
45. Within four weeks after publication has passed, the Plaintiff is to set down his cause and obtain and serve a subpoena to hear judgment.

Otherwise

ORDERS IN CHANCERY.

lxxvii

Otherwise any Defendant may move to dismiss the bill for want of prosecution.

1845.

- | | |
|---|--|
| <p>46. A subpoena to hear judgment is not to be returnable at any time less than one month from the teste of the writ; and it is to be served at least ten days before the return thereof.</p> | <p><i>Subpœna to hear judgment when returnable and to be served.</i></p> |
| <p>47. There must, unless the Court gives special leave to the contrary, be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion, and at least two clear days between the service of a petition and the day appointed for hearing the petition; but, in the computation of such two clear days, <i>Sundays</i> and other days on which the offices are closed, except <i>Monday</i> and <i>Tuesday</i> in <i>Easter</i> week, are not to be reckoned.</p> | <p>Two clear days notice to be given of motions and petitions.</p> |
| <p>48. There must be at least six clear days between the service of a notice of motion, by the Plaintiff, for the appointment of a guardian, by whom a Defendant who is an infant or a person of weak intellect or unsound mind may defend the suit, and the day named in the notice for hearing the motion.</p> | <p>Six clear days notice of motions for appointment of guardian to Defendant under disability.</p> |
| <p>49. At any time within three weeks after the execution of an attachment for want of answer, the Plaintiff may serve a Defendant so attached with a notice of motion that the bill may be taken <i>pro confesso</i> against him, and may move the Court accordingly as directed by Order LXXVI.</p> | <p>When Plaintiff may move to take bill <i>pro confesso</i>.</p> |

<p>XVII. No order is to be made for leave to file exceptions <i>nunc pro tunc</i>.</p>	<p>No exceptions to be filed <i>nunc pro tunc</i>.</p>
--	--

<p>XVIII. If a Defendant, using due diligence, is unable to put in his answer to a bill within the times allowed by Order XVI. the Master (on sufficient cause being shown)</p>	<p>Master may enlarge time for answering</p>
---	--

1845.

may allow to such Defendant such further time, and on such, if any, terms, as to the Master seems just.

and for re-
porting upon
exceptions.

XIX. The Master may enlarge the time for making his report upon exceptions, in all cases where the time is not limited by the order of reference, or by notice given pursuant to article 21. of Order XVI.

In what cases
Master may
further en-
large time.

XX. In all cases where the Master is authorized to appoint the time for any proceeding, or to enlarge the time allowed for any proceeding by General Order, he may further enlarge any time so appointed or enlarged, by himself, and on such, if any, terms, as to him seem just, provided the application for such enlargement is made before the expiration of the time previously allowed, and he is satisfied that such enlargement is required for the purposes of justice, and not with a view to create unnecessary delay.

Discretion in
the Court to
abridge or
enlarge time
generally.

XXI. The power of the Court to enlarge or abridge the time for doing any act, or taking any proceeding in a cause, upon such, if any, terms as the justice of the case requires, is unaffected by these Orders.

Subpœna.

Subpœnas.
When return-
able if served
within the
jurisdiction.

XXII. Subpœnas to appear, or to appear and answer, which are served within the jurisdiction of the Court, are to be made returnable within eight days after the service thereof.

When, if out
of the juris-
diction.

XXIII. Subpœnas to appear or to appear and answer, which are served out of the jurisdiction of the Court, are to be made returnable at such time after the service thereof as the Court by special order may direct; and if an answer be required, each such subpoena is to specify

cify the time after service, within which the Defendant is required to answer.

1845.

XXIV. All writs of subpoena in this Court are to be prepared by the solicitor of the party requiring the same; and the seal for sealing the same is to be marked or inscribed with the words "Subpœna Office, Chancery;" and such writs are to be in the terms mentioned at the foot of these Orders, or as near as may be, with such alterations and variations as circumstances may require.

How to be prepared.

Form of.

XXV. In the interval between the suing out and service of any subpoena, the party suing out the same may correct any error in the names of parties or witnesses, and may have the writ re-sealed, upon payment to the clerk of the Subpœna Office of a fee of one shilling, and at the same time leaving a corrected præcipe of such subpoena, marked, altered and re-sealed, and signed with the name and address of the solicitor or solicitors suing out the same.

May be amended before service.

XXVI. Service upon a Defendant's solicitor of a subpoena to answer an amended bill, or to hear judgment, is to be deemed good service upon the party.

Service of, upon solicitor of Defendant good in certain cases.

XXVII. After the allowance of or submission to exceptions to an answer for insufficiency, a Defendant is to answer within the time appointed, without being served with any subpoena to make a better answer.

Not necessary, to compel further answer after exceptions allowed.

Service of Copy Bill.

XXVIII. Where the Plaintiff has omitted to serve any Defendant with a copy of the bill under the 23rd of the Orders of the 26th of *August*, 1841, within twelve weeks from the filing of such bill, the Court may, if it shall

Copy bill may be served by special leave after expiration of twelve weeks.

1845.

shall think fit, upon the motion of the Plaintiff, without notice, give the Plaintiff leave to serve such Defendant with such copy, within such time and upon such terms as to the Court seems just.

Appearance.

In what cases appearance may be entered for Defendant by clerk of records and writs.

XXIX. If any Defendant, not appearing to be an infant or a person of weak or unsound mind unable of himself to defend the suit, is, when within the jurisdiction of the Court, duly served with a subpoena to appear to or to appear to and answer a bill, and refuses or neglects to appear thereto within eight days after such service, the Plaintiff may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the record and writ clerk to enter an appearance for such Defendant; and, no appearance having been entered, the record and writ clerk is to enter such appearance accordingly, upon being satisfied, by affidavit, that the subpoena was duly served upon such Defendant personally or at his dwelling-house or usual place of abode; and after the expiration of such three weeks, or after the time allowed to such Defendant for appearing has expired, in any case in which the record and writ clerk is not hereby required to enter such appearance, the Plaintiff may apply to the Court for leave to enter such appearance for such Defendant; and the Court, being satisfied that the subpoena was duly served, and that no appearance has been entered for such Defendant, may, if it so thinks fit, order the same accordingly.

In what cases by special order of the Court.

Appearance entered for Defendant under disability irregular.

XXX. Any appearance entered at the instance of the Plaintiff for a Defendant who, at the time of the entry thereof, is an infant or a person of weak or unsound mind,

mind, unable of himself to defend the suit, is irregular and of no validity.

1845.

XXXI. In case it appears to the Court, by sufficient evidence, that any Defendant against whom a subpoena to appear to or to appear to and answer a bill has issued, has been within the jurisdiction of the Court, at some time not more than two years before the subpoena was issued, and that such Defendant is beyond the seas, or that upon inquiry at his usual place of abode (if he had any), or at any other place or places where, at the time when the subpoena was issued, he might probably have been met with, he could not be found, so as to be served with process, and that, in either case, there is just ground to believe that such Defendant is gone out of the realm, or otherwise absconded to avoid being served with process, then and in such case, the Court may order that such Defendant do appear at a certain day to be named in the order; and a copy of such order, together with a notice thereof to the effect set forth at the foot of this Order, may, within fourteen days after such order made, be inserted in the *London Gazette*, and be otherwise published as the Court directs; and in case the Defendant does not appear within the time limited by such order, or within such further time as the Court appoints, then, on proof made of such publication as aforesaid of the aforesaid order, the Court may order an appearance to be entered for the Defendant on the application of the Plaintiff.

Mode of proceeding against Defendant suspected of absconding.

Notice.—“ *A. B.*, take notice, that if you do not appear pursuant to the above order, the Plaintiff may enter an appearance for you, and the Court may afterwards grant to the Plaintiff such relief as he may appear to be entitled to on his own showing.”

XXXII. If,

1845.

Mode of
proceeding
against De-
fendant under
disability.

XXXII. If, upon default made by a Defendant in not appearing to or not answering a bill, it appears to the Court that such Defendant is an infant, or a person of weak or unsound mind not so found by inquisition, so that he is unable of himself to defend the suit, the Court may, upon the application of the Plaintiff, order that one of the solicitors of the Court be assigned guardian of such Defendant, by whom he may appear to and answer or may answer the bill and defend the suit.

Notice thereof
to be given to
the father or
guardian.

But no such order is to be made, unless it appears to the Court, on the hearing of such application, that the subpoena to appear to and answer the bill was duly served, and that notice of such application was, after the expiration of the time allowed for appearing to or for answering the bill, and at least six days before the hearing of the application, served upon or left at the dwelling-house of the person, with whom or under whose care such Defendant was at the time of serving such subpoena, and (in the case of such Defendant being an infant not residing with or under the care of his father or guardian) that notice of such application was also served upon or left at the dwelling-house of the father or guardian of such infant, unless the Court, at the time of hearing such application, thinks fit to dispense with such last-mentioned service.

Mode of
proceeding
against De-
fendant out of
jurisdiction.

XXXIII. Where a Defendant in any suit is out of the jurisdiction of the Court.

1. The Court, upon application supported by such evidence as shall satisfy the Court in what place or country such Defendant is or may probably be found, may order that the subpoena to appear to or to appear to and answer the bill may be served on such Defendant, in such place or country, or within such limits as the Court thinks fit to direct.

2. Such

1845.

2. Such order is to limit a time (depending on the place or country within which the subpoena is to be served) after service of the subpoena, within which such Defendant is to appear to the bill, and also (if an answer be required) a time, within which such Defendant is to plead, answer, or demur, or obtain from the Court further time to make his defence to the bill.
3. At the time when such subpoena shall be served, the Plaintiff is also to cause such Defendant to be served with a copy of the bill, and a copy of the order giving the Plaintiff leave to serve the subpoena.
4. And if, upon the expiration of the time for appearing, it appears to the satisfaction of the Court that such Defendant was duly served with the subpoena, and with a copy of the bill and a copy of the order, the Court may, upon the application of the Plaintiff, order an appearance to be entered for such Defendant.

XXXIV. Affidavits filed for the purpose of proving the service of a subpoena upon any Defendant are to state, when, where, and how such subpoena was served, and by whom such service was effected.

Affidavits of service, form of.

XXXV. The Plaintiff, having duly caused an appearance to be entered for any Defendant, is entitled, as against the same Defendant, to the costs of and incident to entering such appearance, whatever may be the event of the suit; and such costs are to be added to any costs which the Plaintiff may be entitled to receive from such Defendant, or set off against any costs which he may be ordered to pay to such Defendant; but payment thereof is not to be otherwise enforced without the leave of the Court.

Plaintiff entitled to costs of entering appearance.

XXXVI. A

1845.

Defendant for whom appearance has been entered may afterwards enter one for himself.

XXXVI. A Defendant, notwithstanding that an appearance may have been entered for him by the Plaintiff, may afterwards enter an appearance for himself in the ordinary way; but such appearance, by such Defendant, is not to affect any proceeding duly taken, or any right acquired by the Plaintiff under or after the appearance entered by him, or prejudice the Plaintiff's right to be allowed the costs of the first appearance.

No appearance to be entered by Defendant after twelve days from service of copy bill without special order.

XXXVII. No party is to enter either a common or special appearance under the 26th or 27th of the Orders of the 26th of *August* 1841, after the expiration of twelve days from the service of the copy of the bill, without first obtaining an order of the Court for that purpose, such order to be obtained on notice to the Plaintiff, and to be granted, if the Court thinks fit, upon such terms as are just; and any party so entering such common or special appearance is bound by all the proceedings in the cause prior to such appearance being entered, unless the Court otherwise directs.

Scandal and Impertinence.

Exceptions for scandal or impertinence, how to be taken.

XXXVIII. No order is to be made for referring any pleading or other matter depending before the Court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are alleged to be scandalous or impertinent.

Time allowed for referring.

XXXIX. Where any person or party, having filed exceptions to any pleading or other matter depending before the Court for scandal, and any party having filed such exceptions for impertinence, does not obtain an order

order to refer the same to the Master, within six days after the filing thereof, such exceptions are to be considered as abandoned, and the person or party by whom such exceptions were filed is to pay to the opposite party, such costs as may have been incurred by such party in respect of such exceptions.

1845.

XL. Where any person or party, having obtained an order to refer exceptions to the Master for scandal, and any party having obtained an order to refer such exceptions to the Master for impertinence, does not obtain the Master's report thereon within fourteen days after the date of the order, or within such further time as the Master thinks fit to allow, the exceptions and the order referring the same are to be considered as abandoned, and the person or party by whom such exceptions were filed is to pay to the opposite party such costs as may have been incurred by such party, in respect of such exceptions, order, and reference.

For obtaining
report there-
on.

XLI. Upon the expiration of four days from the filing of the Master's report that any pleading or other matter depending before the Court is scandalous or impertinent, the officer having the custody or charge of such pleading or other matter is, upon production to him of an office copy of the Master's report, and a certificate that no exception thereto was filed, or an affidavit that no order to set down any such exception was served within four days after the filing thereof, to expunge from such pleading or other matter, such parts thereof as the Master has found to be scandalous or impertinent, and thereupon, the person or party requiring such scandalous or impertinent matter to be expunged, is to pay to the officer expunging the same, the same fee as on the like occasion has heretofore been paid to the Master.

No expunging
till four days
after report
filed.

XLII. The

1845.

Costs of, in
discretion of
Master.

XLII. The Master having found any pleading or matter depending before the Court to be or not to be scandalous or impertinent, is to direct by whom the costs of and consequent upon the reference are to be paid.

Commission to take Answer.

Commissions
to take an-
swers to be
returnable
immediately.

XLIII. All commissions to take answers are to be made returnable without delay; and a Defendant in a country cause is not to be permitted to crave the common dedimus.

Entering Demurrer and Plea.

Demurrer or
plea may be
set down by
either party
without being
entered with
the registrar.

XLIV. A demurrer or plea need not be entered with the Registrar; but upon the filing thereof by a Defendant, either party is to be at liberty to set the same down for argument immediately.

Demurrer.

Costs, where
demurrer
allowed.

XLV. Where a demurrer to the whole or part of a bill is allowed upon argument, the Plaintiff, unless the Court orders to the contrary, is to pay to the demurring party the costs of the demurrer, and if the demurrer be to the whole bill the costs of the suit also.

General de-
murrer to be
set down
within twelve
days after
filing.

Consequences
to Plaintiff of
default.

XLVI. Where a demurrer to the whole bill is not set down for argument within twelve days after the filing thereof, and the Plaintiff does not, within such twelve days, serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent and for the same purposes, and the Plaintiff is to pay to the demurring party the same costs, as in the case of a demurrer to the whole bill allowed upon argument.

Partial de-
murrer within
three weeks.

XLVII. Where a demurrer to part of a bill is not set down for argument within three weeks after the
filing

filing thereof, and the Plaintiff does not, within such three weeks, serve an order for leave to amend the bill, the demurrer is to be held sufficient, to the same extent and for the same purposes, and the Plaintiff is to pay to the demurring party the same costs, as in the case of a demurrer to part of a bill allowed upon argument.

1845.

Consequences to Plaintiff of default.

Plea.

XLVIII. Where a plea to the whole or part of a bill is allowed upon argument, the Plaintiff, unless he undertakes to reply to the plea, or the Court orders to the contrary, is to pay to the party by whom the plea is filed the costs of the plea, and if the plea be to the whole bill, the costs of the suit also; and in such last-mentioned case, the order allowing the plea is to direct the dismissal of the bill.

Costs, where plea allowed.

If plea be to whole bill, unless Plaintiff undertakes to reply, bill to be dismissed.

XLIX. Where a plea to the whole or part of a bill is not set down for argument within three weeks after the filing thereof, and the Plaintiff does not, within such three weeks, serve an order for leave to amend the bill, or does not, within such three weeks, by notice in writing, undertake to reply to the plea, the plea is to be held good, to the same extent, and for the same purposes, and the same costs are to be paid by the Plaintiff, as in the case of a plea to the whole or part of a bill allowed upon argument; and where the plea is to the whole bill, the Defendant by whom such plea was filed may, at any time after the expiration of such three weeks, obtain as of course an order to dismiss the bill.

Three weeks allowed to Plaintiff for setting down or undertaking to reply to plea.

Consequence of default.

L. The Plaintiff having undertaken to reply to a plea to the whole bill, is not, without the special leave of the Court, to take any proceeding against the Defendant by whom the plea was filed till after replication.

Effect of undertaking upon Plaintiff.

1845.

Course of proceeding for Defendant when sued both at law and in equity, and exceptions taken to his answer.

Election to proceed at Law or in Equity.

LI. A Defendant whose answer is excepted to or referred back on former exceptions, alleging that the Plaintiff is prosecuting him in this Court and also at law for the same matter, may, by notice in writing, require the Plaintiff to procure the Master's report on the exceptions within four days after the service of such notice; and if the Plaintiff does not procure the Master's report in four days accordingly, or if the exceptions be not allowed, such Defendant may obtain, as of course, on motion or petition, the usual order for the Plaintiff to elect in which court he will proceed, with the usual directions; but the Plaintiff may move to discharge such order on the merits confessed in the answer.

Traversing Note.

Form of traversing note, where no answer has been put in.

LII. After the expiration of the time allowed to a Defendant to plead, answer, or demur (not demurring alone) to any original or supplemental bill or bill amended before answer, if such Defendant has filed no plea, answer, or demurrer, the Plaintiff may file a note at the record and writ clerk's office to the following effect: — "The Plaintiff intends to proceed with his cause as if the Defendant had filed an answer traversing the case made by the bill."

Where bill has been amended after answer and no answer put in to the amendments.

LIII. After the expiration of the time allowed to plead, answer, or demur, not demurring alone, to a bill amended after answer, the Plaintiff (if a Defendant has not filed any plea, answer, or demurrer) may file a note at the record and writ clerk's office to the following effect: — "The Plaintiff intends to proceed with his cause, as if the Defendant had filed an answer traversing the allegations introduced into the bill by amendment."

LIV. After

LIV. After the expiration of the time allowed to a Defendant to put in his further answer to any bill, the Plaintiff (if such Defendant shall not have put in any further answer) may file a note at the record and writ clerk's office to the following effect: — "The Plaintiff intends to proceed with his cause, as if the Defendant had filed a further answer traversing the allegations in the bill whereon the exceptions are founded."

1845.

Where no further answer put in after exceptions.

LV. Where a demurrer or plea to the whole bill is overruled, the Plaintiff, if he does not require an answer, may immediately file his note in manner directed by Orders LII. or LIII., as the case may require, and with the same effect, unless the Court, upon overruling such demurrer or plea, gives time to the Defendant to plead, answer, or demur; and in such case, if the Defendant files no plea, answer, or demurrer within the time so allowed by the Court, the Plaintiff, if he does not then require an answer, may on the expiration of such time file such note.

Traversing note may be filed after demurrer or plea overruled, unless the Court gives Defendant time.

LVI. A traversing note having been filed, a copy thereof is to be served on the Defendant against whom the same is filed, in the manner directed by the nineteenth and twenty-first of the Orders of the 26th of October 1842 for the service of documents not requiring personal service.

How to be served.

LVII. A traversing note, being filed and a copy thereof duly served, is to have the same effect, as if a Defendant had filed a full answer or further answer, traversing the whole bill, or such parts of the bill as the note relates to, on the day on which the note was filed.

Effects of, when filed and served.

1845.

Precludes Defendant from answering, &c. without leave.

LVIII. After the service of the copy of a traversing note filed as aforesaid, a Defendant is not at liberty to plead, answer, or demur to a bill, or to put in any further answer thereto, without the special leave of the Court, and the cause is to stand in the same situation as if such Defendant had filed a full answer, or further answer to the bill on the day on which the note was filed.

Injunction to stay Proceedings at Law.

Common injunction, when and how obtained.

LIX. The Plaintiff in a bill praying an injunction to stay proceedings at law is entitled, as of course, on motion or petition, and without an attachment, to the common injunction for want of appearance, if a Defendant has not appeared, in person or by his own solicitor, on or after the expiration of eight days from the service of the subpoena, and for want of answer, if a Defendant is in default for want of answer, on or after the expiration of eight days from the day on which an appearance was entered by or for him.

After common injunction obtained Plaintiff may have one order as of course to amend without prejudice.

LX. The Plaintiff in an injunction cause, having obtained the common injunction to stay proceedings at law, may (either before or after the answer of a Defendant is put in, and whether such injunction be or be not continued to the hearing of the cause) obtain one order, as of course, to amend his bill without prejudice to the injunction; and if such bill be amended pursuant to such order, such Defendant may thereupon, and although he may not have put in his answer to such bill or the amendments thereof, move the Court, on notice, to dissolve the injunction, on the ground that such bill as amended does not, even if the amendments be true, entitle the Plaintiff thereto.

Revivor.

Order to revive, when

LXI. The Plaintiff in a bill of revivor, or of revivor
and

ORDERS IN CHANCERY.

xcl

and supplement, is entitled as of course, upon motion or petition, to the common order to revive, if a Defendant, having appeared in person or by his own solicitor, does not, within eight days after such appearance, plead or demur to the whole bill, or to so much thereof as prays the revivor.

1845.

and how obtained where Defendant appears.

LXII. If the Plaintiff in a bill of revivor or of revivor and supplement, has caused an appearance thereto to be entered for any Defendant against whom it is sought to revive the suit, and such Defendant does not, within eight days after such appearance, plead or demur to the whole bill, or to so much thereof as prays the revivor, the Court may, if it thinks fit, make the common order to revive, upon motion; such motion being made on notice to be served on such Defendant as other notices of motion, if such Defendant was a party to the suit at the time of the abatement thereof; but if such Defendant was not a party to the suit at such time, then such motion is to be made on notice served on such Defendant personally, unless it appears on affidavit, that the Plaintiff is unable or ought not to be bound to serve such notice personally, by reason of such Defendant being out of the jurisdiction, or being concealed, or for any other cause; and if it appears to the Court that the Plaintiff cannot, or ought not to be bound to serve such notice personally, then upon notice otherwise served or published as the Court may direct.

Where appearance has been entered for him.

LXIII. In cases where a suit abates by the death of a sole Plaintiff, the Court, upon motion of any Defendant made on notice served on the legal representative of the deceased Plaintiff, may order that such legal representative do revive the suit within a limited time, or that the bill be dismissed.

Defendant's course where suit abates by death of sole Plaintiff.

1845.

Cases in which
bill may be
amended
without no-
tice.

Amendments of Bill.

LXIV. An order for leave to amend a bill may be obtained, at any time before answer, upon motion or petition, without notice.

LXV. An order for leave to amend a bill, only for the purpose of rectifying some clerical error in names, dates or sums, may be obtained, at any time, upon motion or petition, without notice.

LXVI. One order of course for leave to amend a bill, as the Plaintiff may be advised, may be obtained by the Plaintiff, at any time before filing (or undertaking to file) a replication, and within four weeks after the answer, or the last of several answers is to be deemed sufficient; but no further order of course for leave to amend a bill is to be granted after an answer has been filed, unless in the case provided for by Order LXV.

Form of affi-
davit where
special appli-
cation neces-
sary.

LXVII. A special order for leave to amend a bill is not to be granted without affidavit, to the effect, — first, that the draft of the proposed amendments has been settled, approved, and signed by counsel; and second, that such amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the Plaintiff.

Further affi-
davit in cer-
tain cases.

LXVIII. After the Plaintiff has filed or undertaken to file a replication, or after the expiration of four weeks from the time when the answer or last answer is deemed sufficient, a special order for leave to amend a bill is not to be granted, without further affidavit showing that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into such bill.

LXIX. Such

ORDERS IN CHANCERY.

xciii

LXIX. Such affidavits as are mentioned in Orders LXVII. and LXVIII. are to be made by the Plaintiff and his solicitor, or by the solicitor alone in case the Plaintiff from being abroad or otherwise is unable to join therein.

1845.

By whom to be made.

LXX. Where the Plaintiff obtains an order for leave to amend his bill, and does not amend the same within the time limited for that purpose, the order to amend becomes void, and the cause, as to dismissal, stands in the same situation as if such order had not been made.

Order to amend not acted on within time thereby limited, a nullity.

Amended Bill. No Answer required.

LXXI. Where the Plaintiff amends his bill without requiring an answer to the amendments, no warrant for time to answer such amendments is to be granted after the expiration of eight days from the service of the notice of the amendment of the bill.

No time to be granted for answering after eight days from notice of amendment not requiring an answer.

Defendant likely to abscond without answering.

LXXII. If there is just reason to believe that any Defendant means to abscond before answering the bill, the Court may, on the *ex parte* application of the Plaintiff, at any time after appearance has been entered for such Defendant by the Plaintiff, order an attachment for want of answer to issue against him; and such attachment is to be made returnable at such time as the Court directs.

Mode of proceeding against Defendant suspected of intention to abscond without answering.

Defendant attached for want of Answer.

LXXIII. If any Defendant, being in custody of the serjeant-at-arms or of a messenger under an attachment for want of his answer, is not brought to the bar of the Court within ten days after he was taken into custody, he is to be discharged out of custody by the serjeant-at-

Time allowed for bringing up Defendant attached for not answering when in custody of officer of the Court.

1845.

arms or messenger in whose custody he is, without payment by him of the costs of his contempt, which in such case are to be paid by the Plaintiff; but if such Defendant does not put in his answer within eight days after such discharge, the Plaintiff may cause a new attachment to be issued against him for want of his answer.

When in
prison.

LXXIV. If any Defendant be in prison under, or being already in prison be detained under an attachment for not answering, and be not brought to the bar of the Court within thirty days from the time of his being actually in custody or detained (being already in custody under such attachment), he is to be discharged from the process for want of answer under which he was arrested or detained, by the sheriff, gaoler, or keeper of the gaol in whose custody he is, without payment of the costs of his contempt, which in such case are to be paid by the Plaintiff; but if such Defendant does not put in his answer within eight days after such discharge, the Plaintiff may cause a new attachment to be issued against him for want of his answer.

Course where
Defendant, on
being brought
up, swears he
is too poor.

LXXV. A Defendant being brought up in custody for want of his answer, and making oath in court that he is unable, by reason of poverty, to employ a solicitor to put in his answer, the Court is thereupon to refer it to the Master to inquire into the truth of that allegation, and to report thereon to the Court forthwith; and the Court may appoint a solicitor to conduct such inquiry on the behalf of such Defendant; and if the Master reports such Defendant to be unable, by reason of poverty, to employ a solicitor to put in his answer, the Court may assign a solicitor and counsel for such Defendant to enable him to put in his answer.

Pro

Pro confesso. Preliminary Proceedings.

1845.

LXXVI. Upon the execution of an attachment for want of answer against any Defendant, or at any time within three weeks afterwards, the Plaintiff may cause such Defendant to be served with a notice of motion to be made on some day not less than three weeks after the day of such service, that the bill may be taken *pro confesso* against such Defendant; and thereupon, unless such Defendant has, in the mean time, put in his answer to the bill or obtained further time to answer the same, the Court, if it so thinks fit, may order the bill to be taken *pro confesso* against such Defendant, either immediately, or at such time, and upon such terms, and subject to such conditions, as, under the circumstances of the case, the Court thinks proper.

Mode of proceeding to take bill *pro confesso* against Defendant who has been attached for want of answer.

LXXVII. In cases where any Defendant, either being or not being within the jurisdiction of the Court, does not put in his answer in due time after appearance entered by or for him, and the Plaintiff is unable, with due diligence, to procure a writ of attachment or any subsequent process for want of answer to be executed against such Defendant, by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such Defendant is, for the purpose of enabling the Plaintiff to obtain an order to take the bill *pro confesso*, to be deemed to have absconded to avoid, or to have refused to obey the process of the Court.

When Defendant is to be deemed to have absconded.

LXXVIII. In cases where any Defendant who, under Order LXXVII., may be deemed to have absconded to avoid, or to have refused to obey the process of the Court, has appeared in person or by his own solicitor, the Plaintiff may serve upon such Defendant or his solicitor a notice, that on a day in such notice named (being not less than

Mode of proceeding in that case where Defendant has appeared.

1845.

than fourteen days after the service of such notice) the Court will be moved that the bill may be taken *pro confesso* against such Defendant; and the Plaintiff is, upon the hearing of such motion, to satisfy the Court, that such Defendant ought, under the provisions of Order LXXVII., to be deemed to have absconded to avoid, or to have refused to obey the process of the Court; and the Court being so satisfied and the answer not being filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such Defendant, either immediately or at such time or upon such further notice as, under the circumstances of the case, the Court may think proper.

Where appearance has been entered for him.

LXXIX. In cases where any Defendant, who, under Order LXXVII., may be deemed to have absconded to avoid, or to have refused to obey the process of the Court, has had an appearance entered for him under Orders XXIX., XXXI., or XXXIII., and has not afterwards appeared in person or by his own solicitor, the Plaintiff may cause to be inserted in the *London Gazette* a notice, that on a day in such notice named (being not less than four weeks after the first insertion of such notice in the *London Gazette*) the Court will be moved that the bill may be taken *pro confesso* against such Defendant; and the Plaintiff is, upon the hearing of such motion, to satisfy the Court, that such Defendant ought, under the provisions of Order LXXVII., to be deemed to have absconded to avoid, or to have refused to obey the process of the Court, and that such notice of motion has been inserted in the *London Gazette*, at least once in every week from the time of the first insertion thereof up to the time for which the said notice is given; and the Court, being so satisfied and the answer not having been filed, may, if it so thinks fit, order the bill to be taken *pro confesso* against such Defendant, either immediately or at such time or upon such further notice as, under

under the circumstances of the case, the Court may think proper.

1845.

LXXX. Any Defendant being in custody for want of his answer, and submitting to have the bill taken *pro confesso* against him, may apply to the Court, upon motion with notice to be served on the Plaintiff, to be discharged out of custody; and thereupon the Court may order the bill to be taken *pro confesso* against such Defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears, from the nature of the Plaintiff's case or otherwise, to the satisfaction of the Court that justice cannot be done to the Plaintiff without discovery or further discovery from such Defendant.

Defendant in custody and submitting to have bill taken *pro confesso* may apply for his discharge.

Pro confesso — Hearing : Decree.

LXXXI. No cause, in which an order is made that a bill be taken *pro confesso* against a Defendant, is to be heard on the same day on which the order is made; but the cause is to be set down to be heard, and the Court, if it so thinks fit, may appoint a special day for the hearing thereof.

Cause not to be heard on same day on which order is made for taking bill *pro confesso*.

LXXXII. A Defendant against whom an order to take a bill *pro confesso* is made, is at liberty to appear at the hearing of the cause; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the bill.

Defendant not objecting to the order may appear at the hearing and argue on the merits.

LXXXIII. Upon the hearing of a cause in which a bill has been ordered to be taken *pro confesso*, such decree is to be made as to the Court seems just; and in the case of any Defendant who has appeared at the hearing and waived all objection to such order to take the bill *pro confesso*, or against whom the order has been made

In what cases the decree is to be absolute against such Defendant.

1845.

made after appearance by himself or his own solicitor, or upon notice served on or after the execution of a writ of attachment against him, the decree is to be absolute.

How the Court may, in such case, affect the estate of such Defendant by the decree.

LXXXIV. In pronouncing the decree, the Court may, either upon the case stated in the bill, or upon that case and a petition presented by the Plaintiff for the purpose, as the case may require, order a receiver of the real and personal estate of the Defendant against whom the bill has been ordered to be taken *pro confesso* to be appointed, with the usual directions, or direct a sequestration of such real and personal estate to be issued, and may (if it appears to be just) direct payment to be made out of such real or personal estate, of such sum or sums of money, as, at the hearing or any subsequent stage of the cause, the Plaintiff appears to be entitled to: provided that unless the decree be absolute, such payment is not to be directed without security being given by the Plaintiff for restitution, if the Court afterwards thinks fit to order restitution to be made.

Decree to be passed and entered as usual.

LXXXV. A decree founded on a bill taken *pro confesso* is to be passed and entered as other decrees.

Copy of it to be served on the Defendant:

LXXXVI. After a decree founded on a bill taken *pro confesso* has been passed and entered, an office copy thereof is (unless the Court dispenses with service thereof) to be served on the Defendant, against whom the order to take the bill *pro confesso* was made, or his solicitor; and if the decree be not absolute under Order **LXXXIII.**, such Defendant or his solicitor is to be, at the same time, served with a notice, to the effect, that if such Defendant desires permission to answer the Plaintiff's bill and set aside the decree, application for that purpose must be made to the Court within the time specified

if not absolute to be accompanied with a notice.

specified in the notice, or that such Defendant will be absolutely excluded from making any such application.

1845.

LXXXVII. If such notice as is mentioned in Order LXXXVI. is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the Defendant is to be three weeks after service of such notice ; but if such notice is to be served out of the jurisdiction of the Court, such time is to be specially appointed by the Court, on the *ex parte* application of the Plaintiff.

Specifying the time allowed to Defendant for setting it aside.

LXXXVIII. No proceeding is to be taken, and no receiver appointed under the decree, nor any sequestrator under any sequestration issued in pursuance thereof, is to take possession of, or in any manner intermeddle with, any part of the real or personal estate of a Defendant, and no other process is to issue to compel performance of the decree, without leave of the Court, which is to be obtained on motion with notice served on such Defendant or his solicitor, unless the Court dispenses with such service.

Estate of Defendant not to be affected by the decree if not absolute, without special order.

LXXXIX. Any Defendant waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the Court may direct, may, before enrolment of the decree, have the cause reheard upon the merits stated in the bill, the petition for rehearing being signed by counsel as other petitions for rehearing.

Where decree not absolute Defendant may have cause reheard on certain terms.

XC. In cases where a decree is not absolute under Order LXXXIII. the Court may order the same to be made absolute on the motion of the Plaintiff, made,

How decree not absolute may be made so.

1. After the expiration of three weeks from the service of a copy of the decree on a Defendant, where

ORDERS IN CHANCERY.

1845.

where the decree has been served within the jurisdiction.

2. After the expiration of the time limited by the notice provided for by Order LXXXVI., where the decree has been served without the jurisdiction.

3. After the expiration of three years from the date of the decree, where a Defendant has not been served with a copy thereof.

And such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may, on the hearing of such motion, allow to the Defendant for presenting a petition for leave to answer the bill.

Where decree not absolute, Defendant having a case not appearing in the bill, may upon terms have cause reheard and inrolment (if any) vacated.

XCI. Where the decree is not absolute under Order LXXXIII. and has not been made absolute under Order XC., and a Defendant has a case upon merits not appearing in the bill, he may apply to the Court by petition stating such case, and submitting to such terms with respect to costs and otherwise as the Court may think reasonable, for leave to answer the bill; and the Court, being satisfied that such case is proper to be submitted to the judgment of the Court, may, if it thinks fit, and upon such terms as seem just, vacate the inrolment (if any) of the decree, and permit such Defendant to answer the bill; and if permission be given to such Defendant to answer the bill, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had as if the decree had not been made, and no proceedings against such Defendant had been had in the cause.

Suit may be revived if necessary for the purpose.

XCII. The rights and liabilities of any Plaintiff or Defendant under a decree made upon a bill taken *pro confesso*

ORDERS IN CHANCERY.

ci

~~confess~~ extend to the representatives of any deceased Plaintiff or Defendant, and to any persons or person claiming under any person who was Plaintiff or Defendant at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the Court may, upon motion or petition served in such manner, and supported by such evidence as under the circumstances of the case the Court deems sufficient, permit any party, or the representative of any party, to file such bill or bills, or adopt such proceedings as the nature and circumstances of the case require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered; and the rights of the parties duly ascertained and determined.

1845.

Joining Issue.

XCIIL. No subpoena to rejoin is hereafter to be issued; and only one replication is to be filed in each cause, unless the Court otherwise orders; and the replication is to be in the form set forth at the foot of this Order, or as near thereto as circumstances admit and require; and upon the filing of such replication, the cause is to be deemed to be completely at issue; and each Defendant may, without any rule or order, proceed to examine his witnesses, and the Plaintiff may, in like manner, proceed to examine his witnesses so soon as notice of the replication being filed has been duly served on all the Defendants who have filed an answer or plea, or against whom a traversing note has been filed.

Subpoena to rejoin abolished.

One replication only to be filed.

After notice thereof any party may examine his witnesses without any rule or order.

Form of Replication.

“ Between <i>A. B.</i>	- . . . -	Plaintiff.
	“ and	
“ <i>C. D., E. F., G. H., &c.</i>	- . . . -	Defendants.
		“ The

Form of replication.

1845.

“ The Plaintiff in this cause hereby joins issue with the Defendant *C. D.*” [*all the Defendants who have answered or pleaded, or against whom a traversing note has been filed*], “ and will hear the cause on bill and answer against the Defendant *E. F.*” [*all the Defendants against whom the cause is to be heard on bill and answer*], “ and on the order to take the bill as confessed against the Defendant *G. H.*” [*as the case may be*].

Commission to examine Witnesses.

Commissions
to be directed
to two com-
missioners
only.

Powers of.

One only to
act.

XCIV. Commissions to examine witnesses within the jurisdiction of the Court are to be directed to two commissioners only, and, unless the Court otherwise orders, are to be made returnable without delay ; and the commissioners are to be either barristers or solicitors not concerned in the cause, and each one of such two commissioners is to have all such power and authority to examine witnesses, as have heretofore been vested in the acting commissioners named in the commissions to examine witnesses which have heretofore been issued ; but the commissioner first named in the commissions to be hereafter issued is alone to act in the execution of any commission, unless he is, by illness or other sufficient cause, incapacitated from acting therein, in which case the commissioner secondly named is alone to act in the execution of such commission.

When Plaintiff
shall have car-
riage of com-
mission.

XCV. Immediately after the replication is filed, the Plaintiff, if he thinks fit, may give notice to all other parties entitled to examine witnesses in the cause, of his intention to sue out a commission for that purpose ; and the Plaintiff, if he gives such notice within two days after the filing of the replication, or before any Defendant has given notice of his intention to sue out a commission, is to have the carriage of the commission.

XCVI. After

XCVI. After the expiration of two days from the filing of the replication, if the Plaintiff has not previously given notice to all other parties entitled to examine witnesses in the cause of his intention to sue out a commission for that purpose, any Defendant may give notice to all the other parties entitled to examine witnesses in the same cause, of such Defendant's intention to sue out a commission for that purpose; and any Defendant so giving such notice is to have the carriage of the commission, unless such notice be given by more than one Defendant, in which case the Defendant who first gave such notice is to have the carriage of the commission.

1845.

When a Defendant.

XCVII. Where the parties entitled to examine witnesses in the cause agree to the nomination of persons to be commissioners, and to the order in which such commissioners are to be named, the record and writ clerk, upon being applied to for the purpose, is to cause a commission directed to such persons to be sealed and delivered to the person entitled to have the carriage thereof.

How commission is to issue where parties agree.

XCVIII. If all the parties entitled to examine witnesses in the cause have not, within four days after the filing of the replication, agreed to the nomination of persons to be commissioners, any party entitled to examine witnesses in the cause may apply to the Master to whom any former reference in the cause has been made, or to the Master in rotation in case no former reference has been made, for a warrant, returnable in two days, requiring the other parties to attend for the purpose of having commissioners named; and such Master is to grant such warrant, and the same being duly served, all parties, on the return thereof, are to propose commissioners; and if, among the persons so proposed,

How, where they do not.

Application to Master.

1845.

Master is to
select.

there are two or more to whom no just objection is made, the Master is to select or nominate and certify to be commissioners such two of the proposed persons as appear to him most proper to perform the duty; but if it appears that no one or only one of such proposed persons is free from just objection, the Master, as the case may be, is to nominate and certify two proper persons, or to nominate one proper person and certify him and the person free from objection, to be the commissioners.

And to decide
questions as
to priority of
the Commis-
sioners and
carriage of
commission.

XCIX. If any question arises as to the commissioner who is to be first named, or as to the party who is to have the carriage of the commission, the Master is to determine such question, and to name the party who is to have the carriage of the commission.

Additional
commission
may be ob-
tained on
Master's cer-
tificate.

C. If any party entitled to examine witnesses in a cause shall desire to have any additional commission or commissions, application is to be made to the Master for leave to sue out such additional commission or commissions; and upon the Master's certificate that such additional commission or commissions is or are proper to be issued, the same may be sued out in the same manner as a first or only commission; and in case the parties do not agree, any question respecting the commissioners to be named or the order in which they are to be named in the commission, or any question respecting the carriage of any such additional commission, is to be settled by the Master as in the case of a first or only commission.

Proceedings
to be taken
by the party
having the
carriage of
commission.

CI. The Master is to deliver his certificate of the nomination of the commissioners to the solicitor of the party who is to have the carriage of the commission; and such solicitor is, on the same day, or at the latest on

ORDERS IN CHANCERY.

c v

on the day next following the date of the Master's certificate, to file the same, and is, within two days from the date thereof, to take an office copy thereof to the record and writ clerk, who is, on the same day, or at the latest on the day next following his receipt of such office copy, to seal a commission directed to the persons named in the certificate, and to deliver such commission to the solicitor from whom he received the certificate; and such solicitor having received the commission is, within one week after the teste thereof, to deliver the same to the commissioner therein first named, if he be at the time able to act in the execution of the commission, but if not then to the commissioner secondly named.

1845.

CII. If any solicitor having the carriage of a commission does not, within six days after the date of the Master's certificate, obtain the commission, and duly deliver the same to the commissioner by whom the same is to be executed, any other party entitled to examine witnesses may apply to the Master for leave to take out a new commission directed to the same commissioners, and to have the carriage of such commission; and the costs of such application are to be paid by the party in default, whether the application succeeds or not.

Consequences
of his default.

Form of Commission.

CIII. The form of a commission to be hereafter issued for the examination of witnesses is to be as follows, with such (if any) variations as the circumstances of the case require:—

Form of com-
mission.

“ *Victoria, &c.*

“ To *A. B.* and *C. D.*, greeting.

“ Know ye, that we, in confidence of your prudence
“ and fidelity, have appointed you, and by these pre-

h 2

“ sents

1844

“sents do give unto each of you, full power and au-
“thority, diligently to examine all witnesses what-
“soever, upon certain interrogatories to be exhibited
“to you in a cause wherein *E. F.* is Complainant and
“*G. H.* and others are Defendants; and therefore we
“command, that one of you do, at certain days and
“places to be appointed for that purpose, cause the
“said witnesses to come before you, and then and
“there examine each of them, apart, upon the said in-
“terrogatories, either on their respective corporal
“oaths first taken before you upon the Holy Evan-
“gelists, or in the case of Quakers upon their solemn
“affirmation and declaration, or in such other solemn
“manner as is or may be authorized by law, and that
“you do take such their examinations and reduce
“them into writing on parchment; and when you
“shall have so taken them, you are to send the same
“to us in our Chancery without delay, wheresoever
“it shall then be, closed up and under your seal,
“distinctly and plainly set, together with the said
“interrogatories and this writ. And we further
“command you, that before you act in or be present
“at the swearing or examining any witness or wit-
“nesses you do take the oath first specified in the
“schedule hereunto annexed. And we further com-
“mand, that all and every the clerk or clerks employed
“in taking, writing, transcribing, or engrossing the
“deposition or depositions of witnesses to be ex-
“amined by virtue of these presents shall, before he
“or they be permitted to act as clerk or clerks as
“aforesaid, or be present at such examination,
“severally take the oath last specified in the said
“schedule annexed; and we also give to you full
“power and authority to administer such oath to such
“clerk or clerks in manner aforesaid. Witness our-
“self

ORDERS IN CHANCERY.

cvii

“ self at *Westminster*, the day of
“ in the year of our reign.

1845.

“ LANGDALE.”

(Endorsement.)

“ By order of Court.”

(Name and address of agent and solicitor issuing writ.)

CIV. The oath to be taken by a commissioner is to be set forth in a schedule annexed to the commission, and is to be in the form following; viz. Form of Commissioner's oath.

“ You shall, according to the best of your skill and
“ knowledge, truly, faithfully, and without partiality to
“ any or either of the parties in this cause, take the
“ examinations and depositions of all and every wit-
“ ness and witnesses, produced and examined by
“ virtue of the commission hereunto annexed, upon
“ the interrogatories produced and left with you;
“ and you shall not publish, disclose, or make known
“ to any person or persons whatsoever, except to the
“ clerk or clerks by you employed and sworn to
“ secrecy in the execution of this commission, the
“ contents of all or any of the depositions of the wit-
“ nesses, or any of them, to be taken by you by virtue
“ of the said commission, until publication shall pass
“ pursuant to some general or special order of the
“ High Court of Chancery.

“ So help you God.”

And the said oath is to be taken by the commissioner who is to act in the execution of the commission previously to his acting therein, before any master in ordinary or before any master extraordinary of the Court who is not employed or concerned in the cause, and such master extraordinary is hereby authorized and required to administer such oath. Before whom to be taken.

1845.

Form of Commissioner's
clerk's oath.

CV. The oath to be taken by the clerk or clerks employed in taking, writing, transcribing, or ingrossing the deposition or depositions of witnesses to be examined by virtue of a commission is to be set forth in a schedule annexed to the commission, and is to be in the form following; viz.

“ You shall truly and faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and ingross, the depositions of all and every witness and witnesses produced before and examined by either of the commissioners named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioner to take, write down, or ingross the said depositions, or any of them; and you shall not publish, disclose, or make known to any person or persons whatsoever, the contents of all or any of the depositions of the witnesses or any of them to be taken, written down, transcribed, or ingrossed by you, or whereto you shall have recourse, or be any ways privy, until publication shall pass pursuant to some general or special order of the High Court of Chancery.

“ So help you God.”

Before whom
to be taken.

And the said oath is to be taken before the acting commissioner, by the clerk or clerks employed as aforesaid, before he or they be permitted to act as such clerk or clerks, or to be present at the examination of witnesses under the commission; and the commissioner is hereby authorized and required to administer the said oath to such clerk or clerks accordingly.

Ten days
notice to be
given of time
and place.

CVI. The commissioner having taken such oath is, at the instance of any party entitled to examine witnesses, to sign and deliver to such party a notice in writing,

ORDERS IN CHANCERY.

cix

writing, specifying the time and place when and where he will proceed to examine witnesses, and such notice is to be duly served by the party who obtains it upon the solicitors of all the other parties entitled to examine witnesses under the commission; and in case any such party has no solicitor, upon such party, at least ten clear days before the day therein named for proceeding to examine witnesses.

1845.

CVII. All depositions of witnesses are to be taken and expressed in the first person of the deponent.

Depositions to be taken in the first person.

CVIII. If the examination of witnesses cannot be completed in one day, and the circumstances of the case permit, the commissioner is to proceed *de die in diem*, during six hours of each day between the hours of eight in the morning and six in the afternoon, until the witnesses for all parties are fully examined; nevertheless, the commissioner may, if in his opinion the circumstances of the case require an adjournment, adjourn the proceedings, from time to time and from place to place, in such manner as he thinks proper; but he is in all cases to enter on the depositions any adjournment, and, where such adjournment is from place to place or otherwise than *de die in diem*, the cause or reason of such adjournment, and he is also to enter on the depositions the hours of the day on which he commences and concludes the examination of witnesses on each day, and the true cause of his not proceeding for the full time of six hours on each day, if such should be the case.

Commissioner to proceed *de die in diem*.

Power to adjourn.

Grounds of adjournment to be stated.

CIX. When the examination of witnesses is completed, the commissioner is to seal up the depositions, and is to transmit the same, sealed up with the commission, to the record and writ clerk's office.

Examination, when completed to be transmitted to record and writ office.

ORDERS IN CHANCERY.

1845.

Remuneration
to Commis-
sioner.

CX. The commissioner is, for the performance of his duty as such commissioner, entitled to receive the following sums of money; viz.

For every day in which he is, neces- sarily and without any default of his own, detained in the execution of the commission, for his expenses the sum of	£	s.	d.
	2	2	0

For every day in which he is <i>bonâ fide</i> employed in the examination of wit- nesses, the further sum of	-	-	3	3	0
--	---	---	---	---	---

For every mile that he travels directly from his place of residence to the place where he opens the commission, and from place to place where the commis- sion is adjourned, and from the place where he last acts in the execution of the commission to his place of residence, the sum of	-	-	-	-	0	1	6
--	---	---	---	---	---	---	---

Publication.

Publication to
pass without
rule or order.

CXI. Publication is to pass, without rule or order, on the expiration of two months after the filing of the replication, unless such time expires in the long vacation, or is enlarged by order.

When publi-
cation shall
pass in ordi-
nary cases.

CXII. If the two months after the filing of the replication expire in the long vacation, publication is to pass on the second day of the ensuing *Michaelmas* term, unless the time is enlarged by order.

When, where
time is en-
larged.

CXIII. If the time is enlarged by order, publication is to pass, without rule or order, on the expiration of the enlarged time, unless the enlarged time expires in the long vacation, in which case publication is to pass, without rule or order, on the second day of the ensuing *Michaelmas*

Michaelmas term, unless the time is further enlarged by order.

1845.

Dismissal.

CXIV. Any Defendant may, upon notice, move the Court, that the bill may be dismissed with costs for want of prosecution, and the Court may order accordingly,

In what cases Defendant may move to dismiss for want of prosecution.

1. If the Plaintiff, having obtained no order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, within four weeks after the answer, or the last of the answers, is found or deemed to be sufficient, or after the filing of a traversing note ; or
2. If the Plaintiff, having undertaken to reply to a plea to the whole bill, does not file his replication within four weeks after the date of his undertaking ; or
3. If the Plaintiff, having obtained no order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend ; or
4. If the Plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard, and obtain and serve a subpoena to hear judgment within four weeks after publication has passed.

CXV. Where the Plaintiff has, after answer, amended his bill without requiring an answer to the amendments, any Defendant may, upon notice, move to dismiss the bill with costs for want of prosecution, if the Plaintiff, having obtained no order to enlarge the time, does not file

In what cases, where Plaintiff has amended bill without requiring an answer.

1845.

file the replication, or set down the cause to be heard on bill and answer, within the times following; viz.

1. Within fourteen days after service of notice of the amendment of the bill, in cases where the Defendant does not desire to answer the amendments.
2. Within fourteen days after the Master's refusal to allow further time, in cases where the Defendant, desiring to answer, has not put in his answer within eight days after the service of notice of the amendment of the bill, and the Master has refused to allow further time.
3. Within fourteen days after the filing of the answer, in cases where the Defendant has put in an answer to the amendment, unless the Plaintiff has, within such fourteen days, obtained from the Court a special order for leave to re-amend the bill.

Plaintiff neglecting to set cause down for four weeks after publication has passed, Defendant may set it down.

CXVI. If, after publication passed, the Plaintiff neglects to set down the cause to be heard, any Defendant, after the expiration of four weeks, may set the same down at his own request, instead of proceeding to dismiss the bill for want of prosecution, and may obtain a subpoena to hear judgment, and serve the same on the Plaintiff.

Dismissal of bill on Plaintiff's application or otherwise after cause set down equivalent to dismissal on merits.

CXVII. If the Plaintiff, after the cause is set down to be heard, causes the bill to be dismissed on his own application, or if the cause is called on to be heard in Court and the Plaintiff makes default, and by reason thereof, the bill is dismissed, then and in such case, such dismissal is, unless the Court otherwise orders, to be equivalent to a dismissal on the merits, and may be pleaded in bar to another suit for the same matter.

CXVIII.

CXVIII. A Defendant is not to be at liberty to move to dismiss a bill for want of prosecution, until after the expiration of the time within which a Plaintiff may obtain an order to amend such bill.

1845.

Conditional Order.

CXIX. In all cases where any person or party, having obtained from the Court or from a Master any order upon condition, does not perform or comply with such condition, he is to be considered to have waived or abandoned such order so far as the same is beneficial to himself, and any other party or person interested in the matter may, on breach or non-performance of the condition, take either such proceedings as the order may in such case warrant, or such proceedings as might have been taken if no such order had been made, unless the Court orders to the contrary.

Effect of non-compliance with the conditions of a conditional order.

Costs.

CXX. Where costs are to be taxed as between party and party, the taxing Master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in

What expenses are to be included in costs between party and party.

The service and execution of writs, and the service of orders, notices, petitions, and warrants, Advising with counsel on the pleadings, evidence and other proceedings in the cause,

Procuring counsel to settle and sign pleadings, and such petitions as may appear to have been proper to be settled by counsel,

Procuring consultations of counsel,

Procuring the attendance of counsel in the Master's offices upon questions relating to pleadings or title,

Procuring evidence by deposition or affidavit, and the attendance of witnesses,

and

ORDERS IN CHANCERY.

and

Supplying counsel with copies of or extracts from necessary documents.

~~taxation.~~

But in allowing such costs, the taxing Master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights, or which appear to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party.

Same costs to be allowed in town as in country causes.

CXXI. The costs of such copies of pleadings and proceedings as have heretofore been allowed in the taxation of costs between party and party in country causes, are, hereafter, to be allowed in the taxation of costs between party and party in town causes.

Check upon prolixity of pleadings, &c.

CXXII. If upon the hearing of any cause, petition, or motion, the Court is of opinion that any pleading, petition, or affidavit which has not been referred for impertinence, or any part of any such pleading, petition, or affidavit, is improper or of unnecessary length, the Court may either declare such pleading, petition, or affidavit, or any part thereof, to be improper or of unnecessary length, or may direct the taxing Master to look into such pleading, petition, or affidavit, and distinguish what parts or part thereof are or is improper or of unnecessary length, and may direct the taxing Master to ascertain the costs occasioned to any party by such parts or part thereof as, in the one case, may have been declared to be, and in the other case may have been distinguished as being, improper, or of unnecessary length, and may make such order as is just for the payment, set-off, or other allowance of such costs.

Upon interlocutory applications Court

CXXIII. Upon interlocutory applications, where the Court deems it proper to award costs to either party, the

ORDERS IN CHANCERY.

CXV

the Court may, by the order, direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid.

1845.

may direct payment of a gross sum in lieu of taxed costs.

CXXIV. In cases where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order ordered or decreed to be paid, the taxing Master may tax such costs without any order referring the same for taxation, unless the Court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs; and the costs to be certified by the taxing Master are to be recovered by subpoena.

Under a decree or order entitling a party to costs, the Master may tax them without express order of reference.

CXXV. The costs of a bill of discovery filed by any Defendant to a bill for relief are to be costs in the original cause, unless the Court otherwise orders.

Costs of bill of discovery filed by Defendant to be costs in the original cause.

Affidavits.

CXXVI. All affidavits are to be taken and expressed in the first person of the deponent.

Affidavits to be in the first person.

CXXVII. All copies of affidavits are to be ready for delivery within forty-eight hours after the same are bespoken.

Affidavits to be copied within forty-eight hours.

CXXVIII. Any solicitor, party, or person filing an affidavit not taken and expressed in the first person of the deponent is not to be allowed the costs of preparing and filing such affidavit in any taxation of costs.

No costs of affidavits to be allowed, unless expressed in the first person.

1845.

FORMS OF SUBPOENA.

Subpoena to appear, or to appear and answer, against Defendant within jurisdiction.

1.—To appear and answer, or to appear only, when the writ is to be served on a Defendant [*or Defendants*] within the jurisdiction.

Victoria, by the Grace of God of the United Kingdom of *Great Britain and Ireland* Queen, Defender of the Faith.

To

greeting.

We command you [and every of you, *where more than one Defendant*], that within eight days after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery to a bill, [*or, as the case may be, an information, or amended bill, or information, bill of revivor, bill of revivor and supplement, or supplemental bill,*] filed against you by [and others, *or another*], and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process of contempt as our said Court shall award.

Witness ourself at *Westminster* the day of
in the year of our reign.

DEVON.

[*The following Memorandum to be placed at the foot.*]

Memorandum at foot.

Appearances are to be entered at the record and writ clerk's office in *Chancery Lane, London*; and if you do not cause your appearance to be entered within the time limited by the above writ, the Plaintiff will be at liberty to enter an appearance for you at your expense, and you will be subject to an attachment against your person, and such other process as the Court shall award, and to such order or decree being made against you as the Court shall think just, upon the Plaintiff's own showing.

Subpoena to appear and answer, against Defendant out of jurisdiction.

2.—To appear and answer when the writ is, by leave of the Court, to be served on a Defendant [*or Defendants*] out of the jurisdiction.

Victoria, &c.

To, &c.

We command you [and every of you, *where more than one Defendant*], that within [*insert the time directed by the order giving leave to*

ORDERS IN CHANCERY.

cxvii

1845.

to serve the writ out of the jurisdiction] after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery to a bill [*or, as the case may be, &c.*] filed against you by [and others, or another] and that within [*insert the time directed by the same order*] you do put in your answer to the same bill [*or, as the case may be, &c.*], and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of such process as our said Court shall award.

Witness, &c.

DEVON.

[*The following Memorandum to be placed at the foot.*]

Appearances are to be entered at the record and writ clerk's office in *Chancery Lane, London*; and if you do not cause your appearance to be entered within the time limited by the above writ, the Plaintiff will be at liberty to enter an appearance for you at your expense, and if you do not plead, answer, or demur to the bill, &c. within the time limited by the above writ, you will be subject to such process as the Court shall award, and to such order or decree being made against you as the Court shall think just, upon the Plaintiff's own showing.

Memorandum
at foot.

3. — Subpœna to appear, when the writ is, by leave of the Court, to be served on a Defendant [*or Defendants*] out of the jurisdiction.

Victoria, &c.

To, &c.

We command you [and every of you, *where more than one Defendant*], that within [*insert the time directed by the order giving leave to serve the writ out of the jurisdiction*] after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery to a bill [*or, as the case may be, &c.*] filed against you by [and others, or another]; and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this

Subpœna to
appear, against
Defendant
out of juris-
diction.

ORDERS IN CHANCERY.

this behalf, upon pain of such process as our said Court shall award.

Witness, &c.

DEVON.

[*The following Memorandum to be placed at the foot.*]

Appearances are to be entered at the record and writ clerk's office, in *Chancery Lane, London*; and if you do not cause your appearance to be entered within the time limited by the above writ, the Plaintiff will be at liberty to enter an appearance for you at your expense, and you will be subject to such process as the Court shall award, and to such order or decree being made against you, as the Court shall think just upon the Plaintiff's own showing.

4. — Subpœna to hear Judgment.

Victoria, &c.

To greeting.

We command you [and every of you] that you appear before our Lord High Chancellor [*or before his Lordship or Honour the Master of the Rolls, as the cause may be set down*] on the day of next, or whenever thereafter a certain cause now depending in our High Court of Chancery wherein *A. B.* [and others, *or another, are or*] is Plaintiff [*or Plaintiffs*], and *C. D.* [and others, *or another, are or*] is Defendant [*or Defendants*], shall come on for hearing, then and there to receive and abide by such judgment and decree as shall then or thereafter be made and pronounced, upon pain of judgment being pronounced against you by default.

Witness, &c.

DEVON.

5.—Subpœna for Costs.

Victoria, &c.

To greeting.

We command you [and every of you] that you pay or cause to be paid, immediately after the service of this writ, to or the bearer of these presents, £ costs [in a cause wherein *A. B.* [and others, *or another, are or*] is Plaintiff [*or Plaintiffs*], and *C. D.*

ORDERS IN CHANCERY.

cxix

C. D. [and others, *or* another, are *or*] is Defendant [*or* Defendants, *or* in the matter of *as the case may be,*] by our Court of Chancery adjudged to be paid by you the said under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment.

1845.

Witness, &c.

DEVON.

6.—Subpœna to testify *vivâ voce* in Court, or to testify before the Master.

Victoria, &c.

To greeting.

Subpœna ad test.

We command you [and every of you] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before our Lord High Chancellor [*or* before his Lordship or Honour the Master of the Rolls, *or* before Mr. one of the Masters of our High Court of Chancery, *or* before *E. F. or G. H.*, Commissioners named in a Commission issued to them for that purpose], at such time and place as the bearer thereof shall by notice in writing appoint, to testify the truth according to your knowledge in a certain suit now depending in our High Court of Chancery, wherein *A. B.* [and others, *or* another, are *or*] is Plaintiff [*or* Plaintiffs], and *C. D.* [and others *or* another, are *or*] is Defendant [*or* Defendants], on the part of the [in case of *subpœna duces tecum, add,* and that you then and there bring with you and produce, &c.] And hereof fail not at your peril.

Witness, &c.

DEVON.

7. — Subpœna ad test. and Subpœna duces tecum.

Victoria, &c.

To greeting.

Subpœna ad test. and duces tecum.

We command you [and every of you] that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Mr. one of the examiners of witnesses in our High Court of Chancery, at his office in *Rolls Yard, Chancery Lane, London*, at such times as the bearer hereof shall by notice in writing appoint, [*or* before *E. F. or G. H.* Commissioners appointed for the

VOL. I.

i

examination

ORDERS IN CHANCERY.

1845.



examination of witnesses in our Chancery, at such times and places as the bearer hereof shall by notice in writing appoint,] to testify the truth according to your knowledge in a certain cause depending in our said Court of Chancery, wherein *A. B.* [and others, *or* another, are *or*] is Plaintiff [*or* Plaintiffs], and *C. D.* [and others, *or* another, are *or*] is Defendant [*or* Defendants], on the part of the [in case of *subpœna duces tecum*, add, and that you then and there bring with you and produce, &c.] And hereof fail not at your peril.
Witness, &c.

DEVON.

LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

JAMES WIGRAM, V. C.

ORDERS IN LUNACY.

1st December, 1845.

I, JOHN SINGLETON BARON LYNDHURST, Lord High Chancellor of Great Britain, by virtue of an act of parliament passed in the ninth year of the reign of Her present Majesty, intituled “An Act for the Regulation of the Care and Treatment of Lunatics,” and for the purpose of making immediate provision for carrying the same into effect, hereby order and direct in manner following; that is to say:—

8 & 9 Vict.
c. 100.

I.

THAT every Report, made by either of the Masters in Lunacy as to the lunacy of any person, in pursuance of any direction given by the Lord Chancellor under the provisions of the above-mentioned Act of parliament (a), be, within one calendar month from the date thereof filed by the clerk of the said Masters in Lunacy with the secretary of lunatics, and be submitted to the Lord Chancellor for confirmation.

Reports of
Masters in
Lunacy as to
certificated
Lunatics to be
filed and con-
firmed.

II.

THAT when any such Report finding the person therein named to be a lunatic shall have been so confirmed, either of the said Masters do, from time to time and without any special Order in the matter, enquire and report, who is or are the heir or heirs-at-law and next of kin of the lunatic, and the person or persons who would be entitled to his estate or to shares thereof,

Whereupon
Master is
without spe-
cial order, to
enquire as to :

the heir,

(a) See 8 & 9 Vict. c. 100. s. 95.

ORDERS IN LUNACY.

*under the
statutes for the
distribution of
intestates' estates,*

in case he were,
at the date of such enquiry,

dead intestate,
to whom due notice of attending the

Master in Lunacy is to be given; and also enquire and

report, what is the situation of the lunatic — and the

nature of the lunacy, — and who is the most fit and
proper person to be appointed the guardian of such
lunatic, — and who is the most fit and proper person
to be appointed receiver of the estate of such lu-
natic, — and of what the fortune of the lunatic con-
sists, — and what is the amount of income arising
therefrom, — and in what manner, and at what expense,
and by whom, and where, the lunatic has been main-
tained, — and whether any thing and what is due, and
to whom, in respect of such past maintenance, and to
whom, and out of what fund arising from income the
same ought to be paid, and what is fit and proper to be
allowed for the maintenance and support of the lunatic
for the time past and to come, regard being had to the
circumstances and estate of the lunatic, and from what
time such allowance should commence: Provided al-
ways, that either of the said Masters may, after such
direction given by the Lord Chancellor and before the
confirmation of such Report as aforesaid, if it shall to
such Master seem expedient, commence and take evi-
dence as to all or any of the aforesaid enquiries.

*Evidence
may be taken
on such en-
quiries with-
out waiting
for confirma-
tion of Report.*

*Enquiry as to
the protec-
tion, care, and
management,
of person and
estate.*

under the statutes for the distribution of intestates' estates, in case he were, at the date of such enquiry, dead intestate, to whom due notice of attending the Master in Lunacy is to be given; and also enquire and report, what is the situation of the lunatic — and the nature of the lunacy, — and who is the most fit and proper person to be appointed the guardian of such lunatic, — and who is the most fit and proper person to be appointed receiver of the estate of such lunatic, — and of what the fortune of the lunatic consists, — and what is the amount of income arising therefrom, — and in what manner, and at what expense, and by whom, and where, the lunatic has been maintained, — and whether any thing and what is due, and to whom, in respect of such past maintenance, and to whom, and out of what fund arising from income the same ought to be paid, and what is fit and proper to be allowed for the maintenance and support of the lunatic for the time past and to come, regard being had to the circumstances and estate of the lunatic, and from what time such allowance should commence: Provided always, that either of the said Masters may, after such direction given by the Lord Chancellor and before the confirmation of such Report as aforesaid, if it shall to such Master seem expedient, commence and take evidence as to all or any of the aforesaid enquiries.

III.

THAT either of the said Masters in Lunacy be at liberty, after the confirmation of such Report under the said Act as aforesaid, to receive any proposal or conduct any enquiry, as to the protection, care, and management of the person or estate of the person in such Report found to be a lunatic, and may report thereon as to such Master shall seem fit; but every such Report shall be submitted for confirmation, as is done with respect to Reports when made on special reference.

IV. THAT

ORDERS IN LUNACY.

cxxiii

IV.

1845.

THAT every receiver to be appointed under the provisions of the said Act or his legal personal representatives, as the case may be, do, from time to time, without any special Order in the lunacy for that purpose, attend before one of the Masters in Lunacy, and have an account of his or their receipts and payments for and on account of the lunatic and his estate taken and passed, and that, in taking and passing such accounts, the Master in Lunacy make unto the Receiver or his legal personal representatives, as the case may be, all just allowances, including an allowance of his and their reasonable and proper costs, charges, and expenses, and those of the next of kin of the lunatic, of passing such accounts. And that the General Orders, rules and regulations, for the time being, in force with respect to the accounts of committees and receivers of the estates of lunatics found such by inquisition and the balances thereon, shall, so far as the same may be applicable, be in force with respect to the accounts of receivers of the estates of lunatics under certificate, and the balances thereon.

Receiver to pass accounts without special Order.

The General Orders in Lunacy as to accounting to be in force as far as applicable.

V.


THAT either of the Masters in Lunacy may, from time to time, determine, whether all or how many and which of the next of kin, or of the heirs of any such lunatic as aforesaid, shall, unless at their own costs, attend before the Masters in Lunacy on any proceedings in the lunacy; and that no other of such parties shall be allowed costs out of the estate, unless by Special Order for that purpose.

Master to determine what parties to attend him at the expense of the estate.

VI.

THAT either of the Masters in Lunacy be at liberty, from time to time, and at the request of any party or

Separate Reports may be made and special cir-

1845.

 cumstances
 stated.

otherwise, to make separate Reports or a separate Report, and to state any circumstances as to the subject-matter of the Report specially, as he shall think fit.

VII.

Protection,
 &c. to con-
 tinue six
 months after
 discharge of
 lunatic, un-
 less otherwise
 ordered.

THAT the protection, care, and management of the person and estate of every such lunatic as aforesaid, shall continue for six months, after such person shall cease to be detained as a lunatic upon an Order and Certificate or Order and Certificate, as the case may be, unless the Lord Chancellor shall, in any case, by Order in the particular matter, otherwise direct.

VIII.

Fees;

to be paid
 into Court to
 account of
 suitors' fund.

THAT until further Order, the clerks to the Masters in Lunacy and the secretary of lunatics, take and receive, for the business done under the said Act, the like fees to those for the time being received and taken by them, respectively, for the like business, under or by virtue of the Act passed in the fifth and sixth years of the reign of her present Majesty (*a*), intituled "An Act to alter and amend the Practice and Course of Proceeding under Commissions in the nature of Writs *de Lunatico Inquirendo*;" and that all fees so taken and received be, once in every month, paid into the Bank of *England* to the credit of the Accountant-General of the Court of Chancery to the account entitled, "The Suitors' Fee Fund Account," together with, and as part of the fees payable under the said last-mentioned Act, and be applied as part of such last-mentioned fees.

LYNDHURST, C.

ORDER IN CHANCERY.

CXXV

1846.

ORDER OF COURT (*a*).

31st *January*, 1846.

THE Right Honourable JOHN SINGLETON, Lord LYNDHURST, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY Lord LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, doth hereby in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, intituled, “An act for facilitating the administration of Justice in the Court of Chancery,” and of an act passed in the fifth year of the reign of Her present Majesty, intituled, “An act to amend an act of the fourth year of the reign of her present Majesty, intituled, ‘An act for facilitating the administration of Justice in the Court of Chancery,’ ” and in pursuance and execution of all other powers enabling him in that behalf, order and direct: —

3 & 4 *Vict.*
c. 94.

4 & 5 *Vict.*
c. 52.

That in every case, in which a party shall have been brought up to this Court by virtue of any writ of *habeas* duly issued from the office of the Clerks of Records and

Where party brought up by *habeas corpus*, and

1846.

matter not
disposed of,
a new writ
may issue
without fee.

Writs of the High Court of Chancery, and, by reason of the pressure of other business or from any other cause, the hearing of the cause or matter in which such party is concerned shall have been postponed to a future day, a new writ of *habeas* may be issued for such future day, if the Court shall so direct, without payment of any fee.

LYNDHURST, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

1846.

ORDER OF COURT.

4th *March* 1846.

WHEREAS by an Act of parliament made and passed in the session of parliament held in the eighth and ninth years of the reign of her present Majesty, intituled, “ An Act to alter and amend an Act passed in the third and fourth Year of the Reign of Her present Majesty Queen *Victoria*, intituled ‘ An Act to enable the owners of settled estates to defray the expenses of draining the same by way of mortgage,’ ” it was amongst other things enacted, That, for simplifying the proceedings under the said act, and rendering the same inexpensive, it should be lawful for the Lord High Chancellor, with the assistance of the Master of the Rolls, from time to time to make such orders and provisions as he might think proper for the facilitating the mode of application to the Court, and of the proceedings before the Master or otherwise: And whereas the Right Honourable *John Singleton Lord Lyndhurst*, Lord High Chancellor of *Great Britain*, has, with the assistance of the Right Honourable *Henry Lord Langdale*, Master of the Rolls, and for the purposes in the said Act mentioned, thought proper to make the following orders and provisions: Now, therefore, it is ordered by his Lordship the Lord High Chancellor, with the assistance of his Lordship the Master of the Rolls, that all applications made to this Court pursuant to the said Act, and all proceedings to be had thereunder, shall be made and conducted in the manner directed by the several orders and provisions hereinafter set forth; viz.

8 & 9 *Vict.*
c. 56.
Drainage Act.

Order regu-
lating appli-
cations there-
under.

I. Any

1846.

I.

“ Person entitled to land ”
to present
petition to
Lord Chancellor or
Master of the
Rolls.

Form of Pe-
tition.

Any person entitled to land within the meaning of the said Act, may present to the Lord Chancellor, or to the Master of the Rolls, a petition in the form hereinafter set forth, with such variations as the nature and circumstances of the case may require.

Form of Petition.

In the matter of
and

In the matter of the Act (8 & 9 *Vict. c. 56.*), &c.
To the Right Honourable the Lord Chancellor, *or* the
Right Honourable the Master of the Rolls.

The humble petition of *A. B.*

Sheweth,

That the lands hereinafter mentioned, viz. [*&c. &c. &c.*] are now vested in your Petitioner as tenant for life [*or otherwise in some other character described in the act*], and that your Petitioner claims to be entitled to make permanent improvements in the said lands, by such means as are in the said Act mentioned, and to cause the expense of making the same to be made a charge on the inheritance of the said lands under the provisions of the said Act.

That the said lands are in the actual occupation of *C. D.*, who hath consented in writing to this application.

Your Petitioner therefore prays, That your Petitioner may be at liberty to make permanent improvements in the said lands, by the means in the said Act mentioned, or some of such means, and to cause the expense of making such improvements to be made a charge on the inheritance

inheritance of the said lands under the provisions of the said Act, or that your Lordship will make such other Order in the premises as to your Lordship shall seem meet.

1846.

And your Petitioner, &c. (Signed) *A. B.*

I hereby consent to this petition.

(Signed) *C. D.*, occupying tenant of the lands sought to be improved.

II.

The Petitioner, in any such petition presented to the Lord Chancellor, is to mark the same at or near the top or upper part thereof with the name of one of the Vice-Chancellors.

Petition, if to Lord Chancellor, to be marked for a Vice-Chancellor.

III.

The Master of the Rolls, in the case of any such petition presented to him, and the Vice-Chancellor with whose name any such petition presented to the Lord Chancellor shall be marked, may, upon consideration of such petition, and without any attendance of counsel, solicitor, or Petitioner thereon, if he shall so think fit, make an Order on such petition to the effect following, or to such other like effect, with such variations as the nature and circumstances of the case may require.

Order may be made therein without attendance.

(Form of Order.)

Date

Form of order.

In the matter of, &c.

and

In the matter of the Act (8 & 9 *Vict. c. 56.*), &c.

Upon consideration, &c. of the petition, &c., it is ordered, that it be referred to the Master in rotation to enquire and state to the Court whether the Petitioner is

1846.

is entitled in possession to the lands in the petition mentioned, or any and which of them, within the meaning of the said Act of Parliament, and whether the said lands are in the actual occupation of *C. D.* in the said petition named; and if so, under what title, and whether the said *C. D.* has consented in writing to the said petition, and to the improvements proposed to be made under the provisions of the said Act? And if the Master shall find that the Petitioner is so entitled, and that the said *C. D.* is in such occupation, and has so consented, let the Master further enquire and state to the Court what, if any, other persons or person are or is entitled to, or interested, in the said lands, or any of them in remainder or reversion, or by way of mortgage, charge, or otherwise; and the Petitioner is to be at liberty to lay before the Master proposals for making permanent improvements in the said lands, by any such means as are in the said Act mentioned, and to set forth in such proposals the nature and extent of such improvements, and the estimated expense thereof, and the estimated value of the permanent improvements proposed to be made: And the Master is to enquire and state whether such proposed improvements are permanent improvements within the meaning of the said Act; and if so, what will be the expense of making the same, and what will be the value of such permanent improvements? And whether it will be beneficial to all persons interested in the said lands, that such permanent improvements should be made under the provisions of the said Act? And the Master is to require such evidence to be produced before him, and, if he shall think proper, is to cause such surveys of the said lands to be made, as shall appear to him to be necessary to enable him to make a satisfactory report on the matters hereby referred to him.

IV. The

IV.

1846.

The Master to whom the said reference may be made is to require proof of the deed, will, or other instrument under which the Petitioner claims to be entitled to the land, and of the manner in which the Petitioner claims title under the same, but he is not otherwise to require proof of the title to the land.

What proof of title Master is to require.

V.

The Master, if he shall think it necessary for the due prosecution of the reference, may direct the Petitioner to serve any other person interested in the land, with notice of the proceedings; and such person, so served, may afterwards attend such proceedings as a party thereto; but if such person, being so served, shall decline or neglect to attend pursuant to such notice, the Master may proceed in his absence, and he is to state the same in his Report.

Master may direct other parties interested to be served.

VI.

The Master is, during the reference, to be at liberty to apply, by note in writing to the Judge by whom the Order was made, for any special directions, or for leave to state any special circumstances, touching the matters referred to him; and, if he shall receive any such special directions, or such leave, he is to state the same, and his proceeding thereon, in his Report.

And may during the reference apply to Judge for especial directions. &c.

VII.

The proceedings upon the reference are to be conducted according to the General Rules and Orders of the Court of Chancery, so far as they are consistent with these Orders.

Proceedings on the reference.

VIII. The

1846.

Report to be
filed.

VIII.

The Master's Report is to be filed in the Report Office.

IX.

Fourteen days
allowed for
objecting to
the Report.

Any person interested in the land is, within fourteen days after the filing of the Report, to be at liberty to petition the Lord Chancellor in case the reference was made by him or any Vice-Chancellor, or the Master of the Rolls in case the reference was made by him, that such Report may be reviewed.

X.

What course
may be taken
thereon.

If such petition shall be presented, the Judge by whom the reference was made is to take the same into his consideration; and, if he shall so think fit, he may dispose thereof, either by dismissing the same, or by referring the matter back to the Master with or without special directions.

XI.

Judge may
require at-
tendance of
parties or
argument by
counsel.

The Judge considering such petition that the Master's Report may not be confirmed, may direct any person interested to attend, and may, if he shall think it necessary, but not otherwise, direct the same to be argued by counsel in open Court or otherwise.

XII.

Proceedings
on reference
back.

If a reference back to the Master is made the proceedings are to be as on the original reference.

XIII.

Course when
no objection
is taken to
Report.

If no petition that the Report may be reviewed is presented, the person who has obtained the Report may, after the expiration of fourteen days from the filing of the

ORDERS IN CHANCERY.

cxxxiii

the Report, present a petition for its confirmation, and for leave to make the proposed improvements under the provisions of the Act; and such petition may be in the form herein-after set forth, with such variations as the nature and circumstances of the case may require.

1846.

(Form of Petition.)

In the matter of, &c.

and

In the matter of the Act (8 & 9 *Vict. c. 56.*), &c.

Form of
Petition to
confirm

To the Right Honourable the Lord Chancellor *or* the
Right Honourable the Master of the Rolls.

The humble petition of, &c.

Sheweth,

That in pursuance of an order made in this matter,
bearing date the day of Mr.
the Master to whom the said matter was referred, has
made his Report, bearing date the day of
and for the reasons therein stated has found [*here state
the Master's finding*].

That the said Report has been filed in the Report
Office of this Court, and that no special application has
been made to review the same.

Your Petitioner, therefore, humbly prays your
Lordship, That the said Report may be con-
firmed absolutely, and that your Petitioner
may be authorized to make such permanent
improvements as are certified in the said Re-
port, under the provisions of the said Act.

XIV.

On the presentation of such last-mentioned petition,
the Judge by whom the reference was made is to con-
sider

What courses
may be taken
therein.

1846.



sider the same, and is to dispose thereof by confirming the Report and giving the permission asked, or by referring the matter back to the Master, or by dismissing the petition, or otherwise, as the justice of the case may require.

Judge may
require at-
tendance of
parties or
argument.

XV.

On the consideration of such last-mentioned petition, the Judge may require the attendance of the persons interested; and, if he shall think it necessary, but not otherwise, may direct the matter to be argued by counsel, in open Court or otherwise.

XVI.

Form of
Order con-
firming Re-
port.

The Order confirming the Report may be in the form following, with such, if any, variations, as the nature and circumstances of the case may require.

Form of Order.

Date

In the matter of
and

In the matter of the Act (8 & 9 *Vict. c. 56.*), &c.

Whereas did on the day of
prefer his petition to the Right Honourable
thereby setting forth, and praying, that he might be at
liberty to make permanent improvements in the lands
therein mentioned, under the provisions of the said act;
and thereupon his Lordship, on consideration of the
matter of the said petition, did, by his Order dated the
 day of refer it to the Master to
make the enquiries therein mentioned; and, in pursuance
of the said Order, the said Master has made his Report,
dated the day of , and the said Report
was duly filed in the Report Office, on the day

ORDERS IN CHANCERY.

CXXXV

day of and no application has been made that the same may not be confirmed : and the said *A. B.* doth now, by his petition, pray that the same may be confirmed, and that he may be at liberty to make such permanent improvements as are specified in the said Report, under the provisions of the said Act : his Lordship, on consideration of the matter of the said petition and of the said Master's Report, doth hereby order that the said Report be confirmed, and that the said Petitioner be at liberty to make such permanent improvements in the said lands as are in the said Report mentioned, under the provisions of the said Act.

1846.



XVII.

The Master by whom the Report was made may, upon production to him of the Order confirming the same and giving leave to make the improvements, deliver to the party who has obtained such Order a certificate to the effect and in the form hereinafter stated, with such variations as the nature and circumstances of each case may require.

On production thereof Master may give a certificate.

Form of Certificate.

Form thereof.

Date
In the matter of
and
In the matter of the Act (8 & 9 *Vict. c. 56.*), &c.

Whereas [*Recite, 1st, the Order of Reference ;
2d the Report.
3d, the Order confirming the Report,
and authorizing the improvements
to be made ;*]

Now, therefore, I the said Master, in pursuance of the said act, do hereby certify, that any person advancing money

1846.

money for making the said permanent improvements specified in my said Report will, upon its being made to appear to me that such money, to the amount specified in my said Report, has been fully expended in making the said improvements, or in paying the expense of obtaining the authority of this Court, become and be entitled to a charge on the inheritance of the land for the repayment of the money advanced, with interest; but such charge is to be subject to the terms and conditions provided by the said Act, and before the same can become effective the amount of money expended as aforesaid is to be stated by me by way of endorsement on this certificate.

XVIII.

Duplicate to
be filed.

Such certificate is to be made in duplicate, and one copy thereof is to be filed in the Report Office, and the other copy thereof is to be delivered to the party.

XIX.

On applica-
tion for cer-
tificate Master
may enquire
what sums
have been
advanced, and
on what
terms, and
how ex-
pended, and
on being
satisfied may
make endorse-
ment.

Upon the application of any party to whom such certificate may have been granted, the Master may enquire what sums of money have been *bonâ fide* and truly expended in making such permanent improvements in the said land as are mentioned and certified to be proper in his said Report, and in defraying such expenses as are in the said Act mentioned, and upon what terms as to interest and repayment by instalments the money was advanced; and the Master, having duly enquired into the matter, and being satisfied by proper evidence, may make an endorsement on the said certificate in the form hereinafter set forth, with such variations as the nature and circumstances of each case may require.

Form of Endorsement.

1846.

Form thereof.

Whereas it has been alleged before me that the sum
 of *l.* being the whole [*or part*] of the sum
 of *l.* mentioned in my Report recited in the
 within certificate, has been expended in making such
 improvements and paying such expenses as are therein
 mentioned: I have, pursuant to the liberty given to me
 by the said Act, enquired what expenses have been in-
 curred in and about the application to the Court, and
 making the necessary surveys, valuations, and estimates,
 and also what sums of money have been actually ex-
 pended in such improvements; and evidence as to such
 expenses hath been laid before me, and I have duly
 considered the same; and I do hereby state and certify
 that it hath been made to appear to me that the sum
 of *l.* hath been fully expended in manner
 aforesaid in such expenses as aforesaid, and the sum
 of *l.* for improvements by drainage, warp-
 ing, irrigation, or embankment, and the sum of

l. for improvements by the erection of buildings:
 And I do hereby further certify that the said several
 sums amount in the whole to the sum of *l.*,
 and that the same was [*or were*] advanced on, &c. [*or at*
such several times and in the several sums hereinafter set
forth, viz. &c.]; and that such several sums are to be re-
 paid, with interest after the rate of per centum
 per annum, by such equal annual instalments as are
 hereinafter mentioned, viz., &c. &c.

XX.

The endorsement is to be made in duplicate, and one
 copy thereof is to be written on the party's certificate,
 and delivered to him; the other is to be filed and an-
 nexed to the copy of the certificate filed in the Report
 Office.

Duplicate to
 be annexed
 to the filed
 copy of cer-
 tificate.

1846.

XXI.

Appeal to
Lord Chan-
cellor from
Orders of
Master of the
Rolls or Vice-
Chancellor.

All Orders made by the Master of the Rolls or any Vice-Chancellors are subject to be discharged or varied by the Lord Chancellor on petition to him for that purpose.

LYNDHURST, C.
LANGDALE, M. R.

1847.

ORDER OF COURT.

13th *April* 1847.

THE Right Honourable CHARLES CHRISTOPHER, LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, and The Right Honourable Sir LANCELOT SHADWELL, Vice Chancellor of England, doth hereby in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, intituled “An Act for facilitating the administration of Justice in the Court of Chancery,” and of an act passed in the fourth and fifth years of the reign of Her present Majesty, intituled “An Act to amend an Act of the fourth year of the reign of her present Majesty, intituled ‘An Act for facilitating the administration of Justice in the Court of Chancery,’” and in pursuance and execution of all other powers enabling him in that behalf, order and direct that the Rule and Order hereinafter set forth shall henceforth be and for all purposes be deemed and taken to be a General Rule and Order of the High Court of Chancery, *viz.* —

The Plaintiff is not to obtain an order of course for leave to amend his bill after a defendant (being entitled to notice of

No order of course to amend after notice of

cxl

ORDERS IN CHANCERY.

1847.
motion to
dismiss.

to move) has served a notice of motion to dismiss the
bill for want of prosecution.

(Signed)

COTTENHAM, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

REPORTS

OF

CASES

ARGUED AND DETERMINED

1841.

IN THE

HIGH COURT OF CHANCERY.

DANIEL v. DUDLEY.

Jan. 25.

BY an indenture of settlement, made on the marriage of *Thomas Busby* and *Mary Henn*, bearing date the 27th of *May* 1807, the sum of 1100*l.*, the property of *Mary Henn*, was vested in trustees in trust for the separate use of *Mary Henn* during her life; and after her decease, in trust for *Thomas Busby*, if he should survive her, for his life; and upon the death of the survivor, in trust for the children of the marriage, as *Mary Henn* should by deed or will appoint; and in default of appointment, for the children equally, the shares of sons to be payable at twenty-one, and of daughters

By a marriage settlement a sum of money, the property of the wife, was vested in trustees in trust for the separate use of the wife during her life, and after her decease in trust for the husband during his life, and after the death of the survivor, upon

certain trusts for the children, and in default of children, who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, in trust for such person or persons as the wife should, notwithstanding her coverture, by deed or will appoint, and in default of appointment, in trust to pay and transfer the same to the executors or administrators of the wife. Held, reversing the decree below, that under the ultimate limitation to the executors or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administratrix of the wife as part of her general personal estate.

CASES IN CHANCERY.

1841.

 DANIEL

v.

DUDLEY.

daughters at that age or marriage. After which followed a proviso, that in case there should be no son who should attain twenty-one or leave issue, nor any daughter who should attain that age or marry, the trustees should stand possessed of the fund in trust for such person or persons as the wife should by deed or will appoint; and in default of appointment, in trust “to pay and transfer the same to the executors or administrators of *Mary Henn*.”

The deed also contained several covenants by *Thomas Busby*, one of which was to the effect that he would permit and suffer *Mary Henn*, notwithstanding the intended coverture, to exercise the powers reserved to her by the settlement; and that, in case she should happen to die in his lifetime without having made a complete appointment of the fund, the same or such part thereof as should be unappointed “should be and remain unto and for the only use and benefit of the executors, administrators, and assigns of *Mary Henn*.”

The marriage was solemnized, and afterwards, in the year 1819, *Thomas Busby* took the benefit of the Insolvent Debtors’ Act. In the year 1823 *Mary Busby* died intestate, and without having made any appointment of the fund, leaving an only child. Shortly afterwards *Thomas Busby* died intestate, and without having taken out administration to his wife; and, lastly, in the year 1829, the child died under twenty-one, and without issue.

The Plaintiff, *Charlotte Daniel*, who was a sister of *Thomas Busby*, then took out letters of administration to the estates of *Thomas Busby*, *Mary Busby*, and their child, and having, by virtue of those administrations, obtained possession of the funds, she, with her husband,

band, filed the bill in this cause, suggesting that the defendant, *Dudley*, claimed the fund as assignee under the insolvency of *Thomas Busby*; but submitting that, under the ultimate limitation to the executors or administrators of *Mary Busby*, the absolute interest in the fund, subject to the previous limitations, had vested in the child as her sole next of kin to the exclusion of her husband; and that, upon the death of the child, it had passed to the Plaintiff *Charlotte Daniel*, and the Defendant *Martha Goodson*, another sister of *Thomas Busby*, as the sole next of kin to the child. The bill alleged that *Martha Goodson* and her husband *Henry Goodson*, who was the only other Defendant, were out of the jurisdiction; and it prayed that the rights of all parties interested in the fund might be ascertained and declared, and that it might be secured and administered under the direction of the Court.

1841.

 DANIEL
 v.
 DUDLEY.


The Defendants *Henry* and *Martha Goodson* never appeared in the suit, and no evidence was entered into. By the decree made upon the hearing of the cause by the Vice-Chancellor, it was, amongst other things, declared, that, according to the true construction of the settlement, the Plaintiff *Charlotte Daniel*, as the administratrix of *Mary Busby*, was entitled to the fund for the benefit of the next of kin of *Mary Busby* living at her death, and to the exclusion of her husband.

From that part of the decree the Defendant *Dudley* appealed, and the appeal now came on to be heard.

On the case being opened,

The LORD CHANCELLOR observed, that it was premature and irregular to discuss the question between the assignee and the next of kin, until there had been

1841.


 DANIEL
 v.
 DUDLEY.

an inquiry who the next of kin were; more particularly as the only person who was alleged to be next of kin besides the Plaintiff, *Charlotte Daniel*, had not appeared: besides which, there was this further difficulty, that if the opinion of the Court should be in favour of the assignee, it could make no decree, he being a defendant on the record, unless the Plaintiff would undertake to deal with the fund as the Court should direct.


That undertaking having been given, the argument proceeded.

Mr. Jacob, Mr. Richards, and Mr. Keene, in support of the appeal.

The decision of the Vice-Chancellor, it is conceived, proceeds upon a confusion of two classes of cases which are perfectly distinct; namely, those in which questions of this kind have arisen upon the words "legal or personal representatives," and those in which they have arisen upon the words "executors or administrators." Either of the former terms may, without impropriety of language, be used to denote next of kin, or those who represent others for the purpose of distribution: but executors or administrators cannot with any propriety be so construed. Accordingly, in the former class of cases, the question has always been, what persons are denoted by the words? In the latter, for whom is the trust created? In the present case, therefore, the only question is, for whom is the plaintiff a trustee? It is said, for the next of kin of the wife; but the object of the settlement was to provide for the husband and wife, and the children of the marriage, not for next of kin, who were, of course, unascertained at the date of the settlement, and about whom the parties could not be presumed to feel any interest. Besides,

one

one consequence of such a construction would be to prevent the wife, if she survived her husband, from disposing of the property otherwise than under the power, which was not likely to have been intended. A more probable supposition would be, that when the objects of the settlement were satisfied the property was intended to revert to its original owner. *Ripley v. Waterworth* (a), *Evans v. Charles* (b), *Collyer v. Squire* (c), *Hames v. Hames* (d), *Saberton v. Skeels*. (e)

1841.

 DANIEL
 v.
 DUDLEY.

Mr. *Wigram* and Mr. *Parry*, for the respondents.

In most of the cases which have been cited the question was, whether, under a limitation to executors and administrators, the persons answering that description took beneficially or as trustees, a question which could hardly have arisen unless those words had been considered as words of purchase; whereas the argument on the other side seems to proceed on some fanciful analogy to the rule in *Shelley's* case, as if those words could be construed as words of limitation. It is impossible, however, to construe them otherwise than as words of purchase, and then the Court is at liberty to give them such a meaning as will best correspond with the object and intent of the settlement. That was expressly laid down in *Bulmer v. Jay* (g); the same doctrine was afterwards recognized by the Master of the Rolls in *Graffley v. Humpage* (h), and has been again relied upon by the Vice-Chancellor in *Smith v. Dudley*. (i) It is true, that in that case the limitation was to the executors and administrators of the wife, of her own family; but the words "of her own family" were only relied upon

as

(a) 7 *Ves.* 425.

(b) 1 *Anstr.* 128.

(c) 3 *Russ.* 467.

(d) 2 *Keen*, 646.

(e) 1 *R. & M.* 587.

(g) 4 *Sim.* 48., 3 *M. & K.* 197.

(h) 1 *Beav.* 46.

(i) 9 *Sim.* 125.

1841.


 DANIEL
 v.
 DUDLEY.

as affording a clue to the meaning of the words “executors and administrators.” Even admitting, however, that the intention to exclude the husband is not so unequivocally expressed in the present case as it was in *Smith v. Dudley*, it is at least as clearly implied as it was in *Bulmer v. Jay*: for in this case the husband has covenanted that in the event of the wife dying in his lifetime without making any appointment, the fund shall be for the only use and benefit of the executors and administrators or assigns of the wife.

Besides the authorities above mentioned, the following were also cited and commented upon in the course of the argument. *Bridge v. Abbott* (a), *Anderson v. Dawson* (b), *Wellman v. Bowring* (c), *Price v. Strange* (d), *Baines v. Ottey* (e), *Palin v. Hills*. (g)

The LORD CHANCELLOR (without hearing a reply) said,

Legal or personal representatives may mean next of kin, but executors or administrators cannot. Therefore, none of those cases in which next of kin have been held to take, *ex vi termini*, by the description of legal or personal representatives, have any application to the present. The limitation in this case being to the executors or administrators, it seems to me that it cannot signify whether these words are construed as words of limitation or words of purchase; because, on either supposition, the persons answering that description take in their representative character, and then the fund is to be applied and administered in the same manner as any other assets that come to them in that character. That
 is

(a) 5 B. C. C. 224.

(b) 15 Ves. 532.

(c) 2 Russ. 374., 5 Sim. 328.

(d) 6 Madd. 159.

(e) 1 M. & K. 465.

(g) 1 M. & K. 470.

is the doctrine of all the cases that have been cited, except that of *Bulmer v. Jay*, which stands alone.

1841.

DANIEL

v.

DUDLEY.

As to the covenants in this settlement, on which some stress was laid in the argument, I think they amount to nothing more than an engagement on the part of the husband that he would do nothing to disturb the provisions contained in the preceding part of the instrument, and, consequently, that they have no bearing upon the case one way or the other.

This is my present impression on the question which has been discussed; but, as I said in the outset, I do not see what I can do with the case as it stands at present, for besides the difficulties which I have already suggested, it appears that the insolvency took place in 1819, and the fund did not fall in till 1829; consequently the assignee has no title to sue as such. If *Dudley* were a creditor under the insolvency, of which, however, there is no evidence, and he had appeared here as Plaintiff, that might have raised the question, for he might say that he had an interest in clearing the fund of the wife's debts, if there were any, in order to realise what belonged to the husband's estate for the benefit of his creditors; and a creditor, as I had lately occasion to decide, may sue in this Court on behalf of himself and others for the purpose of securing after-acquired property of the insolvent, though I forbore on that occasion to give any opinion as to whether this Court or the Insolvent Court be the proper jurisdiction to administer such a fund. (a)

On this record, however, *Dudley* is a Defendant, and in that character he cannot represent all the other creditors,

(a) *Ward v. Painter*, L. C. argument at the Rolls, 2 *Beav.* 85., Nov. 7., 1840; reported, on the not yet reported on the appeal.

1841.

DANIEL
v.
DUDLEY.

ditors, though he might as Plaintiff. If he, or some other creditor, will file such a bill, I will make a declaration of the rights of the parties under the settlement, when the case shall be brought regularly before me. But on this record, notwithstanding my desire to save the parties the expense of further proceedings, it seems to me impossible, for the reasons I have mentioned, to make any effectual decree.

No further proceeding was taken, and the suit has since been compromised.

1840.
Nov.

WOOD v. LAMBIRTH.

1841.
Jan. 25.
June 28, 29.
Aug. 11.

A surrender by the wife of a copyholder with his consent, and after having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, held effectual to bar her right of freebench, if any such existed by special cus-


AT a sale of the property of *Isaac Brightwen*, a bankrupt, by his assignees, in the month of *February* 1829, the Defendant *Henry Lambirth* became the purchaser of lot 19., comprising a copyhold messuage and premises of which the bankrupt was at the time of his bankruptcy seised to him and his heirs, according to the custom of the manor of the rectory of *Tollesbury*, having been admitted tenant upon the surrender of one *John Carrington* in the year 1806.

It appeared from the abstract of title delivered to the purchaser, and which commenced with the year 1734, that in the year 1787 the wife of one *James Lufkin*, who was then seised of the estate in his own right,

although at the time of such surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises.


Doctrine as to the operation of fictitious forms of conveyance.

right, had joined with her husband in a surrender of it by way of mortgage; and that subsequently, on the occasion of the admittance of a party after the death of the same *James Lufkin*, under a surrender made by him during his lifetime to the use of his will, his widow “came and in open court remised and released to the purchaser all and all manner of dower and thirds, and other customary estate, right, and title to dower and thirds, and all arrears thereof which she might, should, or of right could or ought to have or claim of, in, to, or out of the said premises.”

1840.

 WOOD
 v.
 LAMBIRTH.

Those entries were the only instances appearing upon the abstract, in which the wife or widow of a copyholder had taken part in any surrender of the estate. The purchaser, however, conceived that they afforded presumptive evidence of a special custom in the manor, entitling the widow of a copyholder to freebench out of all copyhold lands of which her husband might have been seised at any time during the coverture; and as the bankrupt had a wife at the time of his bankruptcy, who was still living, the purchaser objected to the title as being liable to her freebench. He also objected, that there was no evidence that *Carrington* had not a wife when he surrendered the estate to the use of the bankrupt in the year 1806. No attempt was made by the assignees to remove the latter objection; but for the purpose of removing the former, they procured the wife of the bankrupt to make a surrender, which was entered on the court rolls as follows:—

“Be it remembered, that on the 11th day of *July* 1829, *Mary Brightwen*, the wife of *Isaac Brightwen* (the said *Isaac Brightwen* being a customary or copyhold tenant of the said manor), came, &c.; and she being first privately examined separately and apart from
 her

1840.

 WOOD
 v.
 LAMBIRTH.

her said husband, and freely consenting, did, with the privity of the said *Isaac Brightwen*, in consideration of the sum of 30*l.* 4*s.* 2*d.* to her paid by *Henry Lambirth*, surrender into the hands of the lord of the said manor all and singular her right, title, and claim of freebench, dower, or thirds of, in, to, or out of all that, &c.; and all right, title, and interest, claim and demand whatsoever of the said *Mary Brightwen* of, in, or to freebench in respect of the said messuage and premises, to the use and behoof of the said *Henry Lambirth*, his heirs, executors, administrators, and assigns, according to the custom of the said manor.

“ *Mary Brightwen.*

“ *Isaac Brightwen.*”

A copy of that surrender was delivered to the purchaser's solicitor on the 24th of *August* 1829; but he, being advised that it was not effectual to bar the wife's right, persisted in his objections to the title, and refused to complete the purchase, whereupon the assignees instituted this suit for a specific performance of the contract. In the progress of the cause *Henry Lambirth* died, and a supplemental bill was filed against his devisees. By the decree the usual reference was made to the Master, to inquire whether a good title could be made to the estate, and if so, when it was first shewn that such title could be made.


The Master having, by his report, found that a good title could be made, and that it was first shewn on the 24th of *August* 1829, the Defendants excepted to the report, insisting that a good title was not shewn either before or on the 24th of *August* 1829.

The exception came on to be heard before the Lord Chancellor, when

Mr.

Mr. *Lee* and Mr. *Heathfield* appeared in support of the exception.

Mr. *Walker* and Mr. *Wood*, *contra*.

1841.

 WOOD
 v.
 LAMBIRTH.

The LORD CHANCELLOR.

Jan. 25.


The Master has found that a good title can be made to lot 19., and that it was first shewn on the 24th of *August* 1829.

To this report an exception is taken, and the only question necessary to be considered is, whether there be any objection to the title in respect of the freebench of the wife of *Brightwen*, a bankrupt, whose assignees are Plaintiffs in the cause.

The property being copyhold, and there being no proof of any special custom to the contrary, the right of the wife to freebench can only attach upon lands of which the husband dies seised, which has become impossible. It would therefore seem that this objection would, upon that ground alone, be incapable of being supported; but a surrender has been produced, dated the 11th of *July* 1829, by which the wife, having been first privately examined with the privity of her husband, surrendered to the purchaser the copyhold premises, and all her title to freebench therein. This surrender was said to be inoperative for two reasons; 1st, that the wife had not any interest in the land which could be the subject of surrender; and, 2dly, that the husband was no party to the surrender.

The first objection was in early times raised against the effect of fines to bar dower; *Lampet's Case*. (a) The surrender

(a) 10 Co. 46.

1841.

 WOOD
 v.
 LAMBIRTH.

surrender by the wife after being privately examined has always been considered, in cases of copyhold, as equivalent to the fine. If it were not so, the decree in *Brown v. Raindle* (a) was a mere delusion upon the Defendant.

It was then objected that the husband was not a party to the surrender: nor was he in *Scammon v. Maw* (b), but his assent was presumed from the circumstances. In this case his privity is distinctly stated in the surrender. Then as to the time, it appears that this surrender was sent to the Defendant's solicitor on the 24th of August, the day which the Master has reported to be the time at which a good title was shewn.

The exception must be overruled.

Jan 25. The Defendants in the supplemental suit, being dissatisfied with that decision, presented a petition of rehearing, which now came on to be heard.

Mr. Lee and Mr. Heathfield, for the Defendants.


There are many manors in which the widow of a copyholder is entitled to freebench out of all such customary tenements as her husband is at any time seised of during the coverture; *Watkins on Copyholds* (c); and the above-mentioned entries on the Court Rolls can be accounted for only on the supposition that such a custom exists in this manor. Assuming, then, that the bankrupt's wife is or may be entitled to freebench out of the premises in question, has the surrender which she has made, effectually barred her right? Now, that surrender could operate, if at all, only in one of three ways — either as the transfer of an estate, or as the release

(a) 3 Ves. 256.

(b) 5 Bingh. 578.

(c) Vol. ii. p. 73. note.

release of a right, or by way of estoppel. As a transfer it could not operate, because a wife's right to freebench during the lifetime of her husband is a mere possibility which is not a subject of transfer. Neither could it operate as a release; because there was no privity of tenure between the surrenderor and the purchaser at the time of the surrender; he was no party to it, and had no estate or interest beyond a mere equitable right, which the copyhold courts do not recognise. And the consideration expressed in the surrender, if that could be supposed to make any difference, was merely nominal, no consideration having actually been given. Nor, lastly, could the surrender operate by way of estoppel; for it has been settled by a series of decisions that a surrender cannot have that effect. *Taylor v. Philips (a)*, *Doe v. Tomkins (b)*, *Goodtitle v. Morse. (c)* The reason why a fine has that operation in the case of freeholds (*Lampet's Case (d)*) does not apply to copyholds.

1841.

 WOOD
 v.
 LAMBIRTH.

[*The LORD CHANCELLOR.* Lord *Coke* does not put it upon the doctrine of estoppel. And, according to your argument, it could not take effect by way of release, because, until the fine was levied, the cognizee would have no estate upon which a release could operate.]

Where a fine is levied jointly by a husband and wife, the Court will marshal the conveyance in favour of the intention; so that the release, if such it be, by the wife, may operate upon the estate conveyed by the husband. It is humbly submitted that the case of *Scamon v. Maw (e)*, referred to in your Lordship's judgment, does

(a) 1 *Ves. sen.* 229., see p. 230.

(b) 11 *East*, 185.

(c) 3 *T. R.* 565.

(d) 10 *Co.* 46., see p. 49.

(e) 3 *Bing.* 378.

1841.

WOOD
v.
LAMBIRTH.

does not touch this question; because there, as in *Compton v. Collinson* (a) the copyhold estate, which was the subject of the surrender was the estate of the wife, and therefore clearly a proper subject of transfer; the only question being, whether the surrender, being made with the privity of the husband, was equivalent to a joint surrender.

Mr. *Walker* and Mr. *Wood*, *contra*. The general custom of manors is, that the wife's title to freebench depends on the husband's dying seised, and a contrary custom will not be presumed without much clearer evidence than here exists. But, even supposing such a custom, the right of the wife has been effectually barred by her surrender. It is not correct to say that a wife's right to dower or freebench during the lifetime of her husband is a mere possibility. It is an inchoate estate. The reason why a mere possibility cannot be conveyed is because the party is not in the seisin; whereas, in copyholds, the admission of the husband suffices for the estate of the wife, which has been described as but a branch of the estate of the husband. (b) But, even as a release, the surrender would be good; for, though it is true that the purchaser had no estate at the time, yet, when he shall have been admitted under the bargain and sale from the commissioners, his estate will relate back to the act of bankruptcy. And in the mean time the surrender operates as a surrender to the lord of the manor, in trust for the intended tenant. At all events, it will operate by way of extinguishment in the freehold of the lord; and that is as good a security to the purchaser as if the wife's estate had been actually transferred or released to himself. If the objection to this surrender be allowed, it will be impossible for the wife
of

(a) 1 *H. Bl.* 334.(b) *Vin. Abr. Copyhold*, 210. pl. 5.

of a bankrupt copyholder by any means to bar her title to freebench.

1841.

WOOD

v.

LAMBIRTH.

Mr. *Lee* in reply. The only way in which freebench can be barred, is by a release of it to the actual tenant of the land; and that might have been done in this case by making the wife's release contemporaneous with the bargain and sale from the commissioners. The doctrine of relation does not help the argument; for in the case of real estate there is no relation of the legal title, to the act of bankruptcy; *Doe v. Mitchell.* (a) Nor can it be said that the surrender operates as a surrender to the lord: for though a copyholder may undoubtedly surrender to the lord, if there be an intention so to do, the intention here is, expressly, to surrender for the benefit of another tenant, the lord being a mere instrument for that purpose.

The LORD CHANCELLOR.

Aug. 11.

This case having been brought again under my consideration by a petition of rehearing, I have thought it my duty to refer to the several authorities cited, and have reconsidered the whole case with all the attention due to one in which my judgment has been questioned by counsel whose opinions are entitled to the highest respect. I have not, however, been able to find any ground for altering my opinion.

As to *Carrington's* wife, there is no evidence to raise the objection made; and as to the supposed freebench of the bankrupt's wife, there is in the first place no evidence that she would have been entitled to any, there being no sufficient proof of any custom entitling the widow to freebench of land of which the husband does not die seised;
and

(a) 2 M. & S. 446.

CASES IN CHANCERY.

41.
~
OOD
D.
BIRTH.

and as to the surrender by her, no new argument has been brought forward upon the second hearing to prove it ineffectual to bar her freebench if she would otherwise have been entitled to it. Ingenious observations have, indeed, been made as to the manner in which it was to operate; not as a release, it is said, because there is no estate in the releasee, and not as an assignment, because there was only a possibility, and not any assignable estate: but similar objections apply to fines, and to surrenders by husband and wife; and as to fines they prevailed in very early times; but long before Lord *Coke's* time they were held to be groundless, for he, in *Lampet's Case (a)*, says, that no question existed at that time.

The truth is, that, like many other fictions of law, invented for the purpose of promoting the enjoyment of property, the machinery will not bear very critical examination, but being once adopted, it is maintained for the benefit which it is found to confer; technical reasoning has therefore been disregarded when applied to the object of preventing property being alienable on account of the dower or freebench of the wife. In the present case it is peculiarly necessary, because, from the provisions of the Bankrupt Act, the ordinary mode of effecting the purpose may fail. All beneficial interest is taken from the husband, and no surrender is necessary by him, and he may not be forthcoming to make one. How in that case is the wife's freebench to be barred? In this case she was privately examined, and surrendered with the privity of her husband. The second argument has not raised any doubt in my mind, and I must dismiss the petition of rehearing with costs.

(a) 10 Co. 49.

1841.

BEATTIE v. JOHNSTONE.

April 17.

THE Plaintiff, *Mary Stewart Beattie*, was an orphan, the only child of *Scottish* parents, and, at the time of the institution of this suit, of about six years of age. In the year 1835, her father *Thomas Beattie*, whose only property consisted of real estates in *Scotland*, where he resided and was domiciled, having been advised to go to the island of *Madeira* for the sake of his health, executed a deed in the *Scotch* form for the purpose of nominating tutors and curators of his child in case of his death. The deed was attested by two witnesses, and was in the following words : —

“ I, *Thomas Beattie*, Esq., of *Crieve*, judging it to be proper and expedient to appoint tutors and curators to the surviving child procreated, or the children to be procreated betwixt me and *Christina Stewart* or *Beattie* my spouse, as shall happen to be within the years of pupilarity or minority at the time of my decease : Therefore I hereby nominate and appoint the said *Christina Beattie* my spouse, and *John James Hope Johnstone*, Esq., of *Annandale*, *John Walker*, Esq., of *Crawfordton*, *George Graham Bell*, Esq., of *Crurie*, Advocate, *James Hope Stewart* of *Hillhead*, Esq., *William Younger*, Esq. junior, of *Craiglands*, *George Armstrong*, Esq., merchant in *Liverpool*, *Alexander Stewart*, Esq., my brother-in-law,

Although the Court will sometimes appoint a guardian to an Infant without a reference, where no objection is made to the individual proposed, it will in no case dispense with a reference where the guardianship is contested between two parties.

Four persons domiciled and resident in *Scotland* had accepted the trusts of a *Scotch* deed, attested by two witnesses, by which they were duly appointed tutors and curators to a *Scottish* orphan child, whose only property consisted of real estates situated in *Scotland*. The

child having come to reside in *England* for the sake of its health, and a suit having been instituted by other parties, in its name, for the purpose of making it a ward of this Court : Held, on the construction of the deed, that it appeared to be made in contemplation of the child's continuing to reside in *Scotland*, and with reference solely to her so doing ; and the care and custody of the child being considered to be, therefore, unprovided for, and the curators who, under the deed, had the management of the property, being parties, and having appeared, to the suit, the Lord Chancellor referred it to the Master to approve of a scheme for the residence of the child and to appoint guardians.

1841.

 BEATTIE
 v.
 JOHNSTONE.

presently resident in *India*, and *William Stewart*, writer to the signet, to be the tutors and curators of *Mary Stewart Beattie*, the child already procreated betwixt me and the said *Christina Beattie*, and to my other children to be procreated of my body, whether male or female, of my present marriage; declaring that the majority of the above-named persons accepting, and surviving, and resident in *Great Britain* at the time, shall be a quorum, while there are more than two surviving, and in case they shall be reduced to two or one, the whole office shall be vested in such surviving persons or person, with power to the said tutors and curators to appoint factors for managing the means and estates belonging to my said child or children with suitable salaries; with power to them also to grant leases, and generally, to do every other act or deed in the management of the affairs of my said child or children, competent to tutors and curators by the law of *Scotland*; with this provision and declaration always, that the said tutors and curators shall be accountable for their actual intromissions only, and not jointly for one another, and that they shall not be liable for omissions, or for any factors they may appoint, nor be bound to do diligence further than they shall judge necessary in any sort. And I consent to the registration hereof in the books of Council and Session, or others competent, therein to remain for preservation; and to that effect constitute *John Hope*, Esq., Advocate, my procurator."

Shortly after executing that deed, *Thomas Beattie* with his wife and child went to the island of *Madeira*, where he died in the month of *April* 1836. Upon his death his widow with her child came to *England*, and from thence proceeded, in the month of *June* following, to the family mansion in *Scotland*, where, however, she remained only long enough to make some necessary arrangements

arrangements for the settlement of her husband's affairs, and in the month of *November* 1836, went with her child to *Chester*, where her father *Duncan Stewart* resided, he being collector or controller of the customs there. At *Chester* she took a house for a year, at the end of which time she went, for the sake of her own and her daughter's health, to *London*, where, with the exception of an occasional visit to *Hastings*, she continued to reside until her death, without ever returning to *Scotland*. In the meantime the *Scotch* estates of which the infant was heir in tail, and which were of the yearly value of between 2000*l.* and 3000*l.*, were managed by *John James Hope Johnstone*, *George Graham Bell*, *James Hope Stewart*, and *William Stewart*, four of the persons named in the above-mentioned deed, and who alone, upon the death of *Thomas Beattie*, had, in conjunction with his widow, accepted the office of tutors of the infant.

1841.

 BEATTIE
 v.
 JOHNSTONE.

On the 21st of *December* 1840, the widow died at her house in *London*, having a few days previously made a will, by which she gave all her property that she had power to bequeath, to her father and brothers, observing that her daughter was amply provided for; after which, adverting to the delicate health of her child, who was threatened with consumption, she expressed an anxious wish that it should be allowed to reside with her father and her maternal aunt, *Mrs. Buchanan*; and she appointed *Adam Johnstone*, and *Dr. Frederick Quin*, the physician who had attended her in her last illness, her executors.

Shortly after her death the bill in this cause was filed in the name of the infant by *Duncan Stewart*, as her next friend, against the four persons who had accepted the office of tutors as above-mentioned, and against *Adam Johnstone* and *Dr. Quin*, as the executors of *Mrs. Beattie*.

1841.
BEATTIE
v.
JOHNSTONE.

The bill commenced by stating that *Thomas Beattie*, the late father of the Plaintiff, had during his lifetime executed a certain instrument in the *Scotch* form, by which he had vested certain real estates in *Scotland*, of the yearly value of 2000*l.* and upwards, in his wife and the four first named Defendants, in trust for the Plaintiff as tenant in tail, and had appointed the same five persons tutors and curators of the Plaintiff. It then alleged, amongst other things, that the rents of those estates had, since the death of *Thomas Beattie*, been received by his widow and the four Defendants, the tutors, and that at the time of the widow's death she and the other four tutors had a considerable sum of money in their hands, for which they were accountable to the Plaintiff. That the Plaintiff and her mother were, at the time of the death of the latter, domiciled in *England*; and that the four Defendants, the tutors, all resided in *Scotland*. That *Thomas Beattie* had at the time of his death no legal relation; that *Duncan Stewart* was the Plaintiff's nearest relation; and that *Mrs. Buchanan*, the person mentioned in *Mrs. Beattie's* will as her aunt, was one of the Plaintiff's other nearest relations; and that she and *Duncan Stewart* were to be permanently resident in *England*. The bill prayed that the fortune and person of the Plaintiff might be placed under the protection of the Court, and that *Duncan Stewart* and *Mrs. Buchanan*, or some other proper persons, might be appointed her guardians; and that proper directions might be given for her maintenance and education. It also prayed an account of the rents of the estates received by the four Defendants, the tutors, and *Mrs. Beattie*, since the death of her husband; and that the Defendants, her executors, might answer what should be found due from her in respect thereof out of her estate.

On

On the 6th of *January* 1841, being the day on which the bill was filed, the Vice-Chancellor made an order *ex parte*, on the petition of the Plaintiff, appointing *Duncan Stewart* and Mrs. *Buchanan* to be guardians, and referring it to the Master to make the usual inquiries as to the age and fortune of the Plaintiff, and the proper sum to be allowed for her maintenance and education.

1841.

 BEATTIE
 v.
 JOHNSTONE.

The Defendants, the trustees, then appeared to the bill, and having done so, presented a petition, setting forth the deed above-mentioned, which they stated to be an instrument of a testamentary nature; and they insisted that, as such, it operated as a valid appointment, not only of tutors and curators according to the law of *Scotland*, but also of guardians according to the law of *England*. The petition further stated, that the Plaintiff had not, as the petitioners believed, acquired an *English* domicile, having been brought by her mother to *England* for the sake of her health only, and with the intention of returning to *Scotland*. It also stated the belief of the petitioners that nothing was due to the Plaintiff from her mother's estate, and that the Plaintiff had not any property whatever in *England* beyond her wearing apparel, her only property consisting of the *Scotch* estates, which were greatly encumbered; and that by the deed of entail of those estates, the allowance to an infant heir under fourteen years of age was limited to one fourth part of the clear rents. That the petitioners, as tutors, were accountable to the Court of Session for their management of the infant's property, and generally for the discharge of the duties appertaining to their office; and that, after providing for the jointure of the widow and the maintenance of the infant, they had from time to time paid the surplus rents into the Bank of *Scotland*, as required by the law of that country. The petition then suggested cer-

1841.


BEATTIE
v.
JOHNSTONE.

tain inconveniences which were likely to arise from a collision between the laws and forms of this country and of *Scotland*, if the Court of Chancery in *England* were to supersede the guardians testamentary, appointed according to the law of *Scotland*; and it prayed that the order of the 6th of *January* 1841 might be discharged or varied; and that if the Court should think it proper to interfere touching the guardianship of the Plaintiff, the petitioners might be declared to be, or, if they were not already such, might be appointed to be, guardians of the infant Plaintiff: but if the Court should not think fit to declare or appoint the petitioners guardians, then that the Court would be pleased to make such order, by way of reference to the Master, or otherwise, as should seem meet, having due regard to the testator's testamentary disposition, to his domicile, and to the circumstances, and situation of the property, of the infant Plaintiff.

Amongst other affidavits which were filed in support of that petition, was an affidavit of two legal practitioners in *Scotland*, which stated, that by the law of that country, the nomination, by a father, of tutors to his infant child, invested the tutors named in his deed of appointment or nomination, and who accepted the office, with the guardianship of such infant until the age of twelve years if a female, and fourteen if a male; that such guardianship gave the accepting tutors the right to the custody of the person of the infant, subject only to the right of the mother to such custody while the infant was under the age of seven years, provided she remained a widow, but that no such right belonged to the relations of the mother upon her decease.

It also appeared from an affidavit of the petitioners, that *James Hope Stewart*, one of their number, had, immediately on being informed of Mrs. *Beattie's* death, proceeded

proceeded to *London*, where he had arrived in time to attend her funeral, and that, after making such arrangements as were then necessary for the care of the infant Plaintiff, he had left her in charge of his sister Miss *Janet Graham Stewart*, who was an intimate friend of Mrs. *Beattie*, and who had come to stay with her some time before her death for the purpose of attending her in her illness. The same affidavit went on to state, that unless the petitioners should be superseded, it was their intention, in all their arrangements respecting the residence and education of the infant, to consider solely what would be most for her benefit, and also to pursue the same course in the management of her fortune, subject always to the directions and provisions of the *Scotch* laws in respect thereof.

1841.

 BEATTIE
 v.
 JOHNSTONE.

On the other hand, *Duncan Stewart* made an affidavit in opposition to the petition, setting forth, amongst other things, various letters which he had received from Mrs. *Beattie* between the times of her return from *Madeira* and of her death, the object of which was to shew that in consequence of the delicate state of her own health, and that of her child, and the advice of physicians whom she had consulted on her return, and who had recommended a warmer climate than that of *Scotland* for the child, she had determined from that time forth to fix her permanent residence in *England*, and consequently that she had, at the time of her death, acquired an *English* domicile.

On the hearing of that petition before the Vice-Chancellor, his Honor made an order, dated the 19th *March* 1841, discharging the order of the 6th *January* 1841, and appointing the petitioners, the four tutors, as guardians of the Plaintiff, without prejudice to the question, whether the petitioners were entitled to the

1841.

 BEATTIE
 v.
 JOHNSTONE.

guardianship of the Plaintiff under the statute 12 *Charles 2.*
c. 24. s. 8.

: Against that order the Plaintiff appealed, and the appeal now came on to be heard.

Mr. *Jacob*, Mr. *Wigram*, and Mr. *Follett*, in support of the appeal.

If there were no other objection to the order of the Vice-Chancellor, it would be sufficient ground for this appeal that his Honor has declared it to be doubtful, whether an instrument executed in *Scotland*, between *Scottish* parties, and in *Scottish* form, and purporting to confer powers which differ, both in their nature and duration, from those of an *English* guardian, is or is not within the purview of the stat. of *Charles 2.*; for so long as that question remains undecided, it will be uncertain whether the persons named in the order are to act concurrently, as *English* guardians are bound to do, or by majorities, as directed by the deed; whether their authority over the person of the infant is to determine at the age of twelve, or to continue until the age of twenty-one; in short, whether they are to exercise the powers of *Scottish* tutors and curators, or those of *English* guardians. In reality, however, there is no pretence for saying that such an instrument can be treated by the Courts of this country as a valid testamentary appointment of guardians, or that the authority which it purports to confer can extend beyond the limits of the country, by the laws of which that authority is recognised. For the authority of a tutor over an infant is a personal right which is confined to the country, the law of which gives it, and is not like a right existing by contract which follows the parties every where (*a*).

This

(*a*) On this point, however, see *Story, Conflict of Laws*, p. 412.

This instrument then, it is submitted, can, at most, be treated only as an expression of the father's preference for certain individuals, which, although entitled to considerable weight, will not influence the Court so far as to induce it to sanction a nomination of persons, all of whom are resident out of its jurisdiction; least of all in the case of an infant who must necessarily, for some time at least, be resident in this country, and whose health requires, in a peculiar degree, the personal superintendence of the guardians to whose care it is to be entrusted. Such a case is, at all events, not one which ought to have been disposed of without some inquiry, both with reference to the appointment of guardians, and also to the system of management which the peculiar circumstances of the infant might require. The Vice-Chancellor, indeed, in appointing the tutors at once, without any reference, proceeded upon the ground, that, as they had the legal control over the infant's property, and were all resident out of the jurisdiction, the Court had no means of bringing them to terms, and consequently, no alternative but to appoint them guardians. It is submitted, however, that that circumstance ought not to have any influence with the Court; for those parties, by appearing to the suit, have submitted to the jurisdiction, and it is not to be presumed that they will hereafter withdraw themselves from it for the purpose of setting the Court at defiance.

1841.

 BEATTIE
 v.
 JOHNSTONE.

Mr. Knight Bruce, Mr. Richards, and Mr. Romilly, contra.

Admitting that the order in question is of a somewhat unusual character, it is fully justified by the circumstances of the case, as being obviously the only one which the Court, if it interfered at all, could have made without detriment to the Plaintiff. The interference of
 the

1841.

BEATTIE
v.
JOHNSTONE.

the Court, on behalf of infants, is regulated solely by a view to their interest. Accordingly it refuses to act where there is no property, not because it has not the right to act in such a case, but because it cannot, generally speaking, act usefully: *Wellesley v. Duke of Beaufort*. (a) Now, according to that principle, it is scarcely possible to conceive a case in which there could be less ground for the interference of the Court than in the present. Not only is the birth-place of the infant in *Scotland*, but she must also be taken to be domiciled there; for, even supposing that her domicile by birth could be changed by any act of her mother during her minority, (*Pottinger v. Wightman* (b),) it is a speculative question how far the change of the mother's residence, after her husband's death, affected her own domicile by birth and marriage —

[*The LORD CHANCELLOR.*

It seems to have nothing to do with the question now before the Court.]

At all events, it is beyond dispute that the property of the infant consists exclusively of real estates in *Scotland*, (for the suggestion that she has a claim upon her mother's estate is completely displaced by the affidavits.) Those estates are, of course, subject to the *lex loci*, and the parties who have the legal control over them are already bound to pass their accounts in the Courts of *Scotland*, where alone that law is understood and administered. What purpose can it serve, to take the same accounts over again before one of the Masters of this Court, who must derive his knowledge of the principles upon which he is to proceed from the information of *Scotch* lawyers? Then it is not to be forgotten that the Plaintiff is

(a) 2 *Russ.* 1., see p. 21.

(b) 3 *Meri.* 67.

is already under the care of persons of her father's selection and appointment, against whom no charge of misconduct has been ever suggested, and who cannot now, even if they wished it, withdraw from their responsibility to the Courts of their own country, for the due discharge of all the duties incident to their office. Had it been worth their while to insist upon their right, under the deed, independent of the sanction of their appointment by this Court, there would seem to be good ground to contend that that instrument, being testamentary in its nature, and attested by two witnesses, ought, at least so long as the infant is under the age of twelve years, to be recognised by the Courts of this country as a valid appointment of guardians; because the office of tutor, which continues until that period, involves the custody of the infant's person as well as property, and is therefore coextensive in authority with the office of guardian according to the law of *England*. In accepting the confirmation of their appointment from this Court, they have been influenced solely by a view to the infant's benefit, conceiving it better to waive something of their right, rather than put the estate to the expense of discussing an abstract question, which, as long as they retain their authority upon any terms, is of no practical importance.

1841.

 BEATTIE
 v.
 JOHNSTONE.

Even assuming, however, that the deed cannot operate to any extent as a valid appointment of guardians, it is, at least, entitled to as much weight as a testamentary nomination of guardians to an illegitimate child; and the Court has, in many cases, acted upon such a nomination without directing a reference; *Chatteris v. Young*. (a) It is, indeed, objected that, in this case, the parties nominated are all resident out of the jurisdiction. To say nothing,

(a) 1 J. & W. 106.

1841.

 BEATTIE
 v.
 JOHNSTONE.


nothing, however, of the inconsistency of such an objection, in a case where the only property applicable to the maintenance of the infant is situated in a foreign country, and is under the exclusive control of these same parties, the statement is not, in fact, strictly true; for one of the parties is a member of parliament, who is in the habit of residing for several months in every year in *London*, and all of them occasionally come to *England*.

But, even if the objection were founded in fact, it is not necessarily a valid one. Where is the authority for saying that, under no circumstances, will the Court sanction the appointment of persons as guardians, all of whom reside out of its jurisdiction; or that where a *Scottish* father has validly appointed a *Scottish* guardian to his child, the mere circumstance of the necessity of the child's residing in this country is a sufficient reason for displacing such guardian? If that be the case, no *Scottish* guardian can send his ward to be educated at an *English* school or college without exposing the child to the inconvenience of being subject to one system of management in *England* and another in *Scotland*. There is no rule of this Court in the management of its wards so peremptory as not to admit of relaxation, when the interest of the ward requires it: *Campbell v. Mackay* (a), *Logan v. Fairlie* (b); and the inconvenience of applying the rule in question to a case of this kind is sufficiently obvious from the undisputed facts already before the Court, without the necessity of making it the subject of further investigation before the Master. If there is any apprehension of the infant's being removed out of the jurisdiction of this Court, the tutors are willing to give security; but it has never been

(a) 2 *Myl. & C.* 31.

(b) *Jac.* 193.

been asked, because no such intention was ever imputed to them; and as to the objection, that the order of the Vice-Chancellor does not direct a scheme for the management of the infant, the answer is, that it is not the practice to direct a scheme unless when the guardians appear to be acting improperly, which is not the case here.

1841.

 BEATTIE
 v.
 JOHNSTONE.

In the course of the argument,

The LORD CHANCELLOR suggested that every objection might be removed by associating in the guardianship the four tutors, who must, at all events, have the management of the estates, with the grandfather and great aunt, who would always be resident in this country, and amenable to the jurisdiction of the Court; at the same time observing, that if the parties would consent to such an arrangement he would sanction it at once, as being obviously that which would be the most beneficial to the infant.

That offer, however, having been declined on the part of the Respondents, the Lord Chancellor, in conclusion, asked their counsel whether they could shew, upon the face of the deed, a manifest intention that the persons therein nominated as tutors and curators should act as guardians in *England*; and, if not, whether they could cite any case, where the appointment of guardians had devolved upon the Court, and there had been a contest for the guardianship between different sets of claimants, in which the Court had made an appointment at once, without directing a reference.

No satisfactory answer having been given to either of those inquiries, his Lordship, without waiting for a reply, gave judgment as follows:—

The

1841.

BRATTIN
v.
JOHNSTONE.

The LORD CHANCELLOR.

This is one of the many instances in which I have had occasion to observe, that the greatest possible inconvenience has arisen from departing from the regular and established practice of the Court. Nothing can be better established in cases of this sort, requiring delicate investigation, than that the Master should, in the first instance, be the person to enquire: and for two very obvious reasons: first, because it saves a great deal of the time of the Court; and secondly, because these sort of questions, arising out of private family transactions, are much better discussed in private than in public. No doubt, if there is no question to be decided, and if the result is perfectly obvious—as where a reputed father appoints a guardian to a natural child, and no objection is made to the individual—the Court takes upon itself, without putting the estate to the expense of a reference, to do that which the father had intended, but had not strictly, by law, the power of doing: but where it is a matter of contest, I never knew an instance in which the Court disposed of the case, without a previous inquiry before the Master.

The result of a contrary course in this case is, that at this moment I am totally without information as to a number of points, which are essentially necessary to be ascertained, before I can come to a satisfactory conclusion. In the first place, I know nothing of the four gentlemen named in the deed, except as they are described on the face of it. I am told, that information may be procured. Very likely it may; but this is not the proper tribunal before whom, in the first instance, the information ought to be brought. Then I am told about the estate, the value of it, and the particular provision with regard to the destination of the rents. All that



that is matter of inquiry before the Master, and not proper to be, in the first instance, brought before me.

1841.

 BEATTIE
 v.
 JOHNSTONE.

With respect to the first application to the Vice-Chancellor, I think it was a very improper one, because there seems to have been nothing whatever in the situation of the infant to justify such an application; and, even if there had been any necessity for the immediate interposition of the Court, the proper order to have been made would have been an order referring it to the Master to appoint guardians, with a direction that the persons, who were then actually in possession of the infant's person, should have the care of her until the master should have made his report. That sort of order is frequently made where there is a necessity for immediate interposition; but it is obvious that the Vice-Chancellor in making the first order acted quite in the dark; and accordingly, when the matter came before him again, he reversed it. By the first order, the grandfather and great-aunt were appointed guardians. Then these gentlemen come before the Court, and say this order has been made in error, because we are testamentary guardians — four out of eight who were named. Now if that be the fact, a very different view of the case is presented to the Court; for, although the Court has the power of interfering in certain cases with testamentary guardians, it proceeds on very different rules and principles from those which regulate its conduct, where the discretion of appointing guardians devolves upon it in the first instance. And on the supposition that these persons are testamentary guardians, the order now appealed from is clearly erroneous; because, in that case, the Court had no right to appoint four out of eight, nor had it any jurisdiction, on that sort of application, to appoint guardians at all. It had jurisdiction to remove them if they had acted improperly

1841.


BEATTIE
v.
JOHNSTONE.

perly, but it is no part of the business of this Court to appoint persons as guardians, who are already testamentary guardians; least of all, to appoint four out of eight, without information of what has become of the other four.

In my opinion, however, these gentlemen cannot be considered as standing in the situation of testamentary guardians. It is very true that the father has executed a deed, which, if it had expressed an intention of appointing them, or any other persons, guardians generally — guardians in *England* — would, no doubt, have had the operation of effecting such appointment, because it is quite immaterial where the father is living, provided he expresses his intention. But the question is, whether on the face of this instrument he has not in substance said, “I appoint these persons to have the care and custody of my infant child *in Scotland*.” He has not said so in words, but he has appointed them tutors and curators, expressions which, though perfectly understood in *Scotland*, are not descriptive of any office which is recognized by the law of this country, and which are therefore applicable only to the country where that technical term is used. They are to have the care of the Scotch estates as tutors and curators, an office which is distinct in its nature and different in its duration, and which proceeds altogether upon a different footing, from that with which the persons who are now appointed by this Court, and who are called guardians, are invested. When, therefore, I look into this deed for the purpose of discovering the intention of the father, which is all I am now considering, I find not only no evidence of an intention to appoint guardians generally, but expressions used, which satisfy me, that his own intention was confined to the state of the family at that time, namely, a family residing in *Scotland*. That circumstance alone might

might have been his leading motive in selecting persons for the office, who were resident in *Scotland*; and if he had contemplated that which has taken place since, namely, the removal of the family to *England* and the necessity for the child's being in *England*, a similar motive might have induced him to reject that choice, and to appoint persons resident in *England*.

1841.

 BEATTIE
 v.
 JOHNSTONE

It is evident that the Vice-Chancellor was not pressed to give any opinion upon this point, because those, who obtained the order in question, were satisfied to take it without an adjudication upon that question. Neither am I, strictly speaking, asked to decide it; but I cannot deal with the case without deciding it. I must know what the situation of these parties is, whether they are invested with the power and authority which the act of parliament gives them, before I can see my way in dealing with them as persons who have no testamentary right. I have already stated, that, in my opinion, they have no such right; but they are nevertheless persons to whom the father has shewn a marked preference, on the supposition of the infant's residing in *Scotland*; and, no doubt, that circumstance ought very much to influence the Court. But then, if the question is, who ought now to be appointed, I find these gentlemen habitually residing in *Scotland*. One of them is said to be a member of parliament, and therefore in the habit of coming to *England*. That may continue a longer or a shorter time: nobody can tell how long he may continue to be a member of parliament; or whether, being a member of parliament, he may think proper to attend to his parliamentary duties in *London*. That, therefore, would be a very slender ground for the Court to proceed upon, where the objection is that the individual is not habitually residing in this country. With regard to the others, it is not matter of dispute that they are *Scotch-*

1841.


 BEATTIE
 v.
 JOHNSTONE.

men living in *Scotland*, although, no doubt, they may occasionally come to *England*, as resident *Englishmen* may go to *Scotland*: their homes are in *Scotland*; and if the case should arise, which 'is not at all likely to arise, of this Court having to act compulsorily upon them, in order to carry its orders into effect, there is very little probability that it would find them residing in *England*, and, therefore, amenable to its jurisdiction. Treating this, therefore, as a case in which it is my duty to select individuals to fill the office, I cannot but consider that there would be great inconvenience, if not danger, in selecting persons who reside altogether in *Scotland*, or whose domicile is in *Scotland*. The objection is one which has always been felt; and though it has sometimes been disregarded where it has applied to some only of several individuals who seek to be appointed, yet it has invariably been acted upon where it applies to the whole body.

The question of property I consider as removed out of the case by the tutors having appeared in the suit; for I cannot hear the trustees of an estate of the value of 2000*l.* or 3000*l.* a year tell me that there is no property belonging to the child over which the Court can exercise its jurisdiction. They being parties in the cause, and having appeared in the cause, this Court will have no difficulty in finding the means of maintenance for the child.

Although, therefore, I think it irregular, contrary to the practice, and very inconvenient to make an order in the first instance, appointing guardians, yet, as all parties in this case have the same object in view with respect to the treatment of the child; as, on the one hand, the persons who have the immediate care of the child are its nearest relations, and only near relations, and obviously individuals

individuals to whom no personal objection can be made, (for none has been made), and as they are the parties who would naturally be selected if there were nothing to influence the discretion of the Court in appointing any one else; while, on the other hand, there is an obvious convenience in having those persons associated in the guardianship who must at all events have the care of the estate—I am prepared to act at once upon the suggestion which I threw out just now, provided the parties are willing to adopt it: and I cannot but think that their good will for the interest of the infant would be best manifested by their agreeing to be associated in the trust, as to the execution of which there does not appear to be any difference of opinion. However, if that shall not be done, I have no choice left but to refer it to the Master to inquire into the fortune of the child, to approve of a scheme—which, if not always done, is very essential to be done where any difference of opinion is likely to arise as to the mode of management; particularly, when I am told that the health of the child requires a particular mode of treatment, and a residence in a country which would not be naturally its proper place of residence—to approve of a scheme for the residence of the child, and to appoint guardians. I hope the latter part of the order will not be necessary, because I am sure that renewing this contest in the Master's office, and probably in this Court again, will be any thing but beneficial to the infant.

1841.

 BEATTIE
 v.
 JOHNSTONE.

The tutors declined to accede to the Lord Chancellor's suggestion, and have presented an appeal from his Lordship's decision to the House of Lords.

1841.

May 31.
 June 1. 2. 5.
 July 12.
 Aug. 3.

In the Matter of NICKELS' Patent.


Where letters patent for an invention, and the enrolment, contain the same error, the Master of the Rolls has no authority to order the enrolment to be amended, until a corresponding amendment has been made in the letters patent and they have been resealed.

An application having been made to the Crown for the grant of a patent for an invention of machinery for covering fibrous substances &c., and the Solicitor-General having certified in favour of such grant, the invention was, by a mistake of the copying clerk in the Home Office, misdescribed in the Queen's warrant, by inserting the word "recovering" for the word "covering;" and the error was adopted, without being observed, in the Queen's bill, the Privy Seal bill, and the letters patent. After the letters patent had been enrolled, the error was discovered, and the patentee having procured the Queen's warrant, the Queen's bill, and the Privy Seal bill to be duly amended by the proper officers of the crown, presented a petition to the Master of the Rolls, as keeper of the public records, praying that the enrolment might be made to accord with the Privy Seal bill as so amended. And the Master of the Rolls made an order accordingly. But, upon an appeal to the Lord Chancellor by a party, against whom the patentee had previously commenced an action for the infringement of the patent, Held, that the enrolment, could on no account, be allowed to represent what the letters patent did not contain; and the appeal petition was directed to stand over, with liberty to the patentee to make such application to the Lord Chancellor as he should be advised. An application was accordingly made for the amendment of the letters patent, but the Lord Chancellor refused to entertain it, unless upon the terms of the patentee's paying all the costs of the proceedings then pending against the party alleged to have infringed the patent, and undertaking not to commence any new proceedings for past infringement, which terms having been declined, a joint order was made by the Lord Chancellor and the Master of the Rolls, by which the previous order of the Master of the Rolls was discharged, and the enrolment, which had in the meantime been amended pursuant to that order, was directed to be restored to its original state.

THIS was an appeal from two orders, made by the Master of the Rolls upon a petition which had been presented to him, as Keeper of the Public Records, by one *Christopher Nickels*, a patentee.

The petition stated, in substance, that the petitioner had, in the month of *September* 1838, applied, in the usual way, for the grant of a patent "for an invention of certain improvements in machinery, for covering fibres applicable in the manufacture of braid and other fabrics," and had in due course obtained letters patent, bearing date the 21st of *April* 1838. That both his original petition to the Crown, and the Solicitor-General's report approving of the grant, and also the specification of

of the invention which the petitioner had, after the grant of the letters patent, duly signed, sealed, and caused to be enrolled, had described the invention correctly, as above mentioned. But that the petitioner had lately discovered that an error had been made in the office of the Secretary of State for the Home Department, in the Queen's warrant, in which the clerk, whose duty it was to prepare that instrument, had, by mistake, inserted the word "recovering" for the word "covering," and that the several officers who were entrusted with the preparation of the subsequent documents, viz.: the Queen's bill, the Signet bill, the Privy Seal bill, the Letters Patent, and the Enrolment or Exemplification, had all adopted the error. It then stated that the Queen's warrant had been amended by substituting the word "covering" for the word "recovering," a memorandum being written upon it and signed by the Secretary of State, certifying that the correction had been made in the presence of her Majesty, and by her Majesty's command: that the Queen's bill had also been corrected in like manner, and that the signet transcript thereof, called the Signet bill, had also been similarly amended by the proper officer, and deposited with the Lord Privy Seal; but that the Privy Seal bill was in the hands of the officer of the Court of Chancery appointed for the purpose of enrolling the letters patent: and the petition therefore prayed, that the proper officer from the Privy Seal office might be allowed to make the alteration in accordance with the Queen's bill, and that the exemplification or enrolment of the letters patent might be corrected according to the transcript of the Queen's bill.

1841.

In re
 NICKELS'
 Patent.

The petition, (which was signed by the Solicitor-General, as signifying his consent to it on behalf of the crown), came on, in the first instance, *ex parte*; but the Master of the Rolls, having been informed that pro-

1841.

In re
NICKELS'
Patent.

ceedings were pending between the patentee and a certain company called the *London Caoutchouc Company*, in which the validity of the patent was in question, directed that the petition should stand over, in order that notice of it might be given to the company. Such notice having accordingly been given, the petition came on again before the Master of the Rolls, in the presence of counsel for the *London Caoutchouc Company*, when it appeared, from the affidavits, that the patentee had, in the month of *June* 1840, instituted a suit against the company, in the Court of Chancery, to restrain an alleged infringement of his patent, which he described in his bill, as a patent for improvements in machinery for *covering* fibres &c.; and had afterwards, by leave of that Court, brought an action against the company, for the purpose of trying the validity of his alleged patent; that the company had pleaded to the action, and had also sued out a writ of *scire facias* to repeal the letters patent, insisting, in the objections which they delivered both with their pleas to the action and with their declaration in *scire facias*, that the only letters patent which appeared to have been granted to the patentee, were letters patent for improvements for *recovering* &c., and that no specification had been enrolled corresponding to such letters patent, and that for that reason, amongst others, the letters patent were invalid. On the part of the company it was sworn, that until the above mentioned proceedings were instituted against them, none of the directors of the company were aware of the existence of any patent for *covering* &c.; while, on the other hand, the patentee stated in his affidavit, that until he was put upon inquiry by the perusal of the writ of *scire facias*, which contained the word “recovering” instead of “covering,” he was not aware of the error which had found its way into his letters patent.

Upon

Upon that petition the Master of the Rolls made the two orders in question.

1841.

In re
NICKELS'
Patent.

By the first of those orders, dated the 27th of *March* 1841, it was ordered that the proper officer from the office of the Privy Seal, should be at liberty to attend the officer in whose custody the Privy Seal bill then was, and to amend the said Privy Seal bill, if he should think fit, by striking out the word "recovering" and inserting the word "covering" in lieu thereof; and it was ordered that the rest of the prayer of the petition should stand over.

By the second order, which was dated the 30th of *March*, after reciting that the Privy Seal bill had been produced to the Master of the Rolls by the officer in whose custody it then was, and that it appeared to have been amended in pursuance of the liberty given by the first order, it was ordered that the enrolment made from the Privy Seal bill should be amended, by striking out the word "recovering," and inserting the word "covering" in lieu thereof, so as to make the enrolment conformable to the Privy Seal bill as so amended; and that the proper officer should attend his Lordship with the enrolment for the purpose of such amendment being made in his presence: and it was ordered that a copy of that order should be endorsed on the roll on which the enrolment was made.

The case now came before the Lord Chancellor upon the petition of the *London Caoutchouc Company*, praying that both of those orders might be discharged with costs.

May 31.

Mr. *Wigram* and Mr. *Hindmarch*, appeared in support of the appeal petition.

D 4

With

1841.

In re
NICKELS'
Patent.

With respect to the first order, they contended that it was erroneous, in allowing the Privy Seal bill, which was in the nature of an original writ, to be altered without being resealed, the rule being, that after a writ has once been executed, and its authority exhausted, it could not be altered without being resealed; and that when resealed it took effect, in its altered form, from the date of such resealing.

The LORD CHANCELLOR, however, observed that no question of that kind could arise upon this order, because all that it did was, to allow access to the document for the purpose of making a certain alteration.

As to the second order, they insisted that, although doubtless not so intended by the learned Judge by whom it was pronounced, it amounted to nothing less than the falsification of a record, inasmuch as the enrolment was, in contemplation of law, a copy of the letters patent and not of the Privy Seal bill, although, in practice, it was generally made out from the latter document. That if the letters patent required amendment, the proper and regular course was to make an application to the Attorney General under the provisions of the stat. 5 & 6 *W. 4. c. 83. s. 1.*, which statute, however, expressly provided that the alteration should be made without prejudice to proceedings pending at the time; whereas the effect of the order in question would be to make the Caoutchouc Company wrongdoers by relation: for the enrolment would now represent that the patentee had all along been entitled to a patent for machinery for *covering* fibres, &c., and, therefore, by the aid of the stat. 13 *Eliz. c. 6.* which dispensed with the production of the letters patent, and made the enrolment evidence of their contents, the patentee would be enabled, on the trial of the action then

pending, to give evidence of a patent which, it was admitted, had never in fact passed the great seal.

1841.

In re
NICKELS'
Patent.

Mr. *Tinney*, Mr. *Dixon*, and Mr. *Corrie*, for the patentee, admitted, that such would be the effect of the order in question; but contended that a patentee of an invention was regarded as, in some sort, a purchaser for value, *Williams v. Williams* (a); and that it was an act of justice, and not merely of grace and favour, on the part of the Crown to relieve him from the consequences of a defect in his title, occasioned by the default of one of its own officers. That an amendment, the only object of which was to make the record of a grant correctly represent what the grant was originally intended to contain, stood on a totally different footing from alterations suggested by an after-thought of the patentee; and that it was to cases of the latter description only that the stat. 5 & 6 W. 4. c. 83. was intended to apply: the other class of cases having, they said, always been remediable by an exercise of the common law prerogative of the Crown; in support of which proposition they cited several abstracts of cases, which they said the Master of the Rolls had found by a search among the records in the Rolls Chapel, and in which it appeared that verbal inaccuracies in the records of grants from the Crown had been amended by former Masters of the Rolls, a memorandum, to that effect, being in each case annexed to, or written upon the margin of, the roll. (b) Upon those cases however being mentioned,

The

(a) 3 Mer. 157.

(b) In consequence of the observation of the Lord Chancellor upon these cases, it is conceived that it would answer no useful

purpose to state the substance of them. The references to the Rolls from which they were abstracted, are as follows:—

1. Pat. 2 Hen. 7. p. 1. m. 5.

1841.

In re
NICKELS'
Patent.

The LORD CHANCELLOR said,

Those cases prove nothing to the present purpose: because, for any thing that appears, the letters patent may, in all of them, have been altered first. There is a power, or should be a power, to alter the letters patent; and when that has been done, there must be a power to alter the enrolment: but the thing to be shewn is, that the enrolment has ever been altered without a previous alteration of the letters patent.

Mr. *Wigram*, in reply.

June 5.

On coming into court on a subsequent day, the Lord Chancellor expressed himself as follows:—

I have desired that this petition might be put into the paper, not for the purpose of finally disposing of it, but only for the purpose of informing the parties of the view I take of the case, in order that the patentee may have an opportunity, if he should be so advised, of taking some other course with a view to protect himself against the consequences of the mistake which has occurred.

That there was a mistake is evident. It is quite clear that the application for the patent properly described what the patentee wanted, namely a patent for covering fibrous substances, and that the mistake arose in the Secretary of State's Office for the Home Department, where, in copying, the letters "re" were prefixed to the
word

-
- | | |
|---------------------------------|------------------------------|
| 2. Pat. 8 Hen. 8. p. 2. m. 4. | 9. Pat. 1 & 2 Ph. & M. p. 3. |
| 3. Pat. 35 Hen. 8. p. 1. | 10. Pat. 1 Eliz. p. 9. |
| 4. Pat. 36 Hen. 8. p. 4. | 11. Pat. 5 Eliz. p. 7. |
| 5. Pat. 36 Hen. 8. p. 12. | 12. Pat. 7 Eliz. p. 5. |
| 6. Pat. 37 Hen. 8. p. 5. m. 24. | 13. Pat. 7 Jac. p. 18. |
| 7. Pat. 2 Ed. 6. p. 4. | 14. Pat. 8 Jac. p. 44. |
| 8. Pat. 2 Ed. 6. p. 5. | 16. Pat. 9 Car. 1. p. 5. |

word “covering,” so that from that period down to the time when the great seal was affixed to the patent, all the documents described the patent as a patent for *recovering* fibrous substances, instead of *covering*. The patent having been granted with that word in it, the enrolment contained that word also. At a certain time, which is not very material for the present purpose, this error was discovered. An action having been brought by the patentee against a person alleged to have infringed his patent, it was discovered that the patent was not, as the patentee intended, for *covering*, but for *recovering*; and, no doubt, after having been at the expense of procuring the patent, and after having disclosed to the public the nature of his alleged discovery, and after having thought himself secure in the enjoyment of the patent for some considerable length of time, it was a very great hardship upon him to find, that, owing to an error made in one of the public offices, he should not be in a situation to maintain his action against the party, whom he alleges to have infringed his patent.

1841.

In re
 NICKELS'
 Patent.

On the other hand, it must be recollected, that the only evidences of the patent, accessible to the public, were the docket book, kept in the Patent Office, and the enrolment, both of which contained the word “*recovering* ;” and if, with a knowledge of nothing else, a party had proceeded to carry on business in a mode which would be no infringement of a patent for *recovering*, it would be very hard if he were to be liable to an action for so doing, there being no public evidence of the patent which he is said to have infringed. There is, or may be, hardship, therefore, on both sides.

The patentee, discovering that there was this error in his patent, takes the usual course for correcting that error: he applies to the Secretary of State for the Home Department,

1841.

In re
NICKELS'
Patent.

Department, and procures the Queen's bill to be amended by introducing the word "covering" instead of "recovering." A corresponding amendment is then made in the Signet bill, and the Privy Seal bill is amended from that, with the memorandum of the proper officer of the Privy Seal Office that it was done in consequence of the amendments in the previous documents. Now the Privy Seal bill is the authority under which the holder of the Great Seal puts the Great Seal to the patent. It is no authority to any other person, and is issued for no other purpose whatever. In this instance it has been amended; the object, and the only object, of such amendment, being to give new instructions to the holder of the Great Seal, authorising him to amend the letters patent according to the memorandum found on the Privy Seal bill. Having obtained that amendment, however, in the Privy Seal bill, what use does the party make of it? Why, instead of doing that, for which alone the amendment was made, instead of applying to the Great Seal to consider what, under the circumstances, might be done by way of relieving him from his difficulty, he goes at once to the Master of the Rolls, and obtains an order to alter the enrolment, so as to make it represent that a patent was granted, as of the date at which the patent originally was granted, for *covering* fibres; whereas it is a fact known to both parties, and not disguised by the patentee, that his patent is for *recovering*: and this is done for the avowed purpose of enabling him, on the trial of an action now pending, to give in evidence this enrolment, as correctly representing the grant of the Crown.

Now I have communicated with the Master of the Rolls since the case was argued; and the Master of the Rolls entirely concurs with me in the opinion, which I understand that he intimated when the case was before him,

him, that nothing can be permitted to remain, which will enable the party to produce an enrolment differing from the letters patent. If any doubt could exist upon that point on other grounds, it would be removed by the statute of *Elizabeth* (a), which enables parties, by producing the enrolment, to dispense with the necessity of producing the letters patent, that provision evidently proceeding on the assumption, that the enrolment correctly represents what is contained in the letters patent. The title of the party, derived from the Crown, rests on the authority of the letters patent, the enrolment being only permitted to be used for the purpose of shewing what the patent was, or rather of preventing the danger which might otherwise arise from attempts to alter the letters patent, which, being in the possession of the party, are of course more exposed to frauds and other casualties than the enrolment, which is kept in this Court, can be.

1841.

In re
 NICKELS'
 Patent.

The hardship of the case, however, being obvious, it will be my duty, to do what I can, consistently with the rules which regulate the conduct of the holder of the Great Seal in matters of this nature, to relieve the party, provided I can do it without injury to others. For that purpose what I propose is, before making any order for the restoration of the enrolment, which I may perhaps be able to dispense with altogether, to give the patentee an opportunity of adopting the regular course in cases of this kind, namely, of applying to the Great Seal to correct that which is obviously an error in the terms in which the patent was granted. What may be the result of that application, I do not at all anticipate; but the patentee may be assured that he will, in no event, be permitted to produce,

as

(a) 13 *Eliz. c. 6.*

1841.

In re
NICKELS'
Patent.

as evidence of his patent, an enrolment which does not represent what the letters patent contain.

The appeal petition accordingly stood over, and the patentee presented a petition to the Lord Chancellor, praying that the letters patent might be made to accord with the Privy Seal bill as corrected. At the same time, however, the petition disclosed the fact, that the two first letters of the word "recovering" had actually been erased in the letters patent; but it was positively stated in affidavits, made, in support of that petition, both by the patentee himself and by his agents, in whose custody alone the letters patent were stated to have been, that after diligent inquiry they were unable to discover when or by whom such erasure had been made.

July 12.


Upon the last-mentioned petition coming on to be heard,

Mr. *Tinney*, Mr. *Dixon*, and Mr. *Corrie*, who appeared in support of it, asked, in the first instance, that the amendment might be made in the letters patent without resealing them, on the ground that the error was a mere clerical error, for which the patentee himself was in no way to blame, and that, unless it could be amended without resealing, the amendment would be useless, as they apprehended that the patent would then take effect only from the date of the resealing.

The LORD CHANCELLOR.

You say the error in this case is a mere clerical error; and so it is in one sense, but it is an error which goes to the very foundation of the party's title; and all the cases, cited the other day, of amendments of clerical errors in records, are cases of grants of property,

perty, or some interest in property, by the Crown, in which the only parties concerned were the Crown and the grantee ; whereas, here, there are third parties to be considered. However, whether the Crown has or has not the power of doing what you say it ought to do, is what we need not discuss, unless you can shew me that I have authority to do it. Now the Great Seal acts under the authority of the Privy Seal ; and the instructions I receive from the Privy Seal are, to reseal the letters patent with the alteration. [The Lord Chancellor here took up a Privy Seal bill relating to another patent, which he had directed to be sent for, for the purpose of illustration, and proceeded as follows : —] What I now hold in my hand is a Privy Seal bill which was first brought to me on the 19th of *January* 1841, and, afterwards, again on the 3d of *February*, for the purpose of altering the letters patent. When this Privy Seal bill was first brought to me, pursuant to the stat. of *Hen. 8.(a)*, this *recepti* was indorsed upon it : — “ Received the 19th of *January* 1841.” That was the date of the original patent — for the statute does not authorise me to put the Great Seal to any patent except as of the day on which the Privy Seal bill is brought to me — then some error was discovered in the patent, and very shortly afterwards, namely on the 3d of *February*, in the same year, it was brought back, together with the altered Privy Seal bill, and a docket in these words : — “ To be resealed for the purpose of inserting the words, &c.” [the words of the alteration]; and the *recepti* upon that is, “ Received the 3d of *February* 1841, for the purpose of resealing the patent for the insertion of the words, &c.”

1841.

In re
 NICKELS' |
 Patent.

Mr. *Tinney* then begged that the Lord Chancellor would have the goodness to inform him whether the
 date

(a) 27 *Hen. 8. c. 11.*

1841.

In re
NICKELS'
Patent.

date of the alteration and resealing would appear upon the face of the letters patent, observing that, if it would not, he conceived that the alteration would answer the purpose of the patentee, although accompanied by resealing, and he should be willing to take it in that way.

The LORD CHANCELLOR.

The date, of course, is not altered in the letters patent; but there is the *recepti* on the Privy Seal bill to shew when the resealing took place. If, however, you are content to have the amendment made in the ordinary form, I should like to know, before we proceed further, upon what terms you are willing that the alteration should be made. There may be very good reasons why you should not have any indulgence, since I have not yet heard the other side. In the meantime, let it be understood that I shall certainly do nothing but what is usual; that is to say, I shall, at all events, only reseal the letters patent upon a Privy Seal bill being properly brought before me, and that I shall not even do that without taking care that it shall not prejudice other persons.

I may observe that I had some doubt, before, as to the mode in which an alteration was to be made, when the letters patent had been actually enrolled. I have since, however, been furnished with the only instance of the kind which I am told exists; and it was effected in this way: An application had been made to Lord *Alvanley*, when he was Master of the Rolls, to alter the enrolment. He thought he could not do it, because it would make the enrolment vary from the letters patent; and afterwards, on communication with the Lord Chancellor, who thought the case was one in which an alteration ought to be made in the patent, the Master of the Rolls came
into

into this Court, and, under the authority of the Lord Chancellor, the patent, having been altered, was resealed, and then the Master of the Rolls made the enrolment correspond with the patent so altered.

1841.
In re
NICKELS'
Patent.

The case then stood over, in order that the patentee might consider upon what terms he was willing that the alteration, if allowed, should be made.

On the following day it was again spoken to, when

July 2.

The LORD CHANCELLOR said, that the only terms on which he would entertain the application to amend the patent at all, were, that the patentee should abandon, and pay the costs of, all proceedings then pending, and undertake not to bring any other action for the infringement of his patent up to that time.

Mr. *Tinney* having, on this day, stated that his client declined to accede to the terms which had been suggested,

Aug. 5.

The LORD CHANCELLOR said, that, that being the case, he had only to dispose of the appeal petition, and to restore the enrolment to its original state; for which purpose, as the document was in the custody of the Master of the Rolls, it would be necessary to make a joint order.

The order, after reciting that the Lord Chancellor had called to his assistance the Master of the Rolls upon the subject of his orders, bearing date the 27th and 30th days of *March* 1841, and that it appeared that *Christopher Nickels*, the patentee, had not procured the

1841.

In re
NICKELS'
Patent.

Letters Patent to be altered according to the Privy Seal bill as altered, was as follows:—

It is hereby ordered and directed that the order made by his Lordship the Master of the Rolls, dated the 30th day of *March* last, and endorsed on the Roll on which the enrolment of the said Privy Seal bill is made, be discharged; and that the enrolment be restored to the state in which it was before such order was made; and that a copy of this order be endorsed on the said Roll.

In the course of the long Vacation Lord *Cottenham* resigned the Great Seal, which was thereupon delivered by her Majesty to Lord *Lyndhurst*, who was sworn into office, and took his seat in the Lord Chancellor's Court at *Westminster*, on the first day of *Michaelmas* term.

Nov. 4.
Dec. 23.

SMITH v. The EAST INDIA COMPANY.

A correspondence having passed between the Court of Directors of the *East India* Company and the Commissioners for the affairs of *India*, (in pursuance of the

THE Plaintiff was the captain of one of the *East India* Company's ships, in which he sailed in the year 1832 on a voyage from *London* to *Madras* and *Canton*. At *Madras* he purchased a quantity of cotton from the company's agents, and shipped it on board the vessel on his own account to *Canton*, where he sold it, and with the proceeds purchased a cargo of silk, with which

requisitions of the stat. 3 & 4 W. 4. c. 85.,) relating to a dispute which had arisen with respect to a commercial transaction in which the company had been engaged with a third party, Held, that the correspondence was, on the ground of public policy, a privileged communication, and, consequently, that the company were not bound to produce, or set forth the contents of, it in answer to a bill of discovery, filed against them by such third party, in relation to the transaction to which it referred.

which he returned in the following year to *London*. On his arrival at *London* the silk was deposited in the company's warehouses and sold; but in accounting to the Plaintiff for the proceeds, the company, in addition to a deduction for the freight of the silk from *Canton* to *London*, claimed to retain a further sum in respect of freight of the cotton from *Madras* to *Canton*; which latter claim being resisted by the Plaintiff, he brought an action against the company for the balance of the proceeds, after deducting the freight of the silk, and then instituted this suit for a discovery, and an injunction to restrain the Defendants from setting up a bond, which he had executed to the company's agents at *Madras*, and which, in addition to a covenant for the payment of the purchase-money for the cotton on the arrival of the ship at *Canton*, contained also a covenant to pay a certain sum for freight; the bill alleging that the cotton in question was of an inferior quality, and that the Plaintiff had purchased it at a higher price than could otherwise have been obtained, in consideration of his being allowed stowage for it to *Canton*, free of freight; and that upon the bond being tendered to him for execution, he had objected to the covenant as to freight, as being inconsistent with the terms of his contract, and had at length executed it only upon the faith of an assurance from the company's agent, that it was merely inserted in compliance with the ordinary form used in such cases, and that it was not intended, in this instance, to be enforced.

1841.
SMITH
v.
The
EAST INDIA
Company.

The bill contained the usual charge as to documents; in answer to which the Defendants referred to three schedules, as containing all the documents in their possession relating to the matters in question, but insisted that they were not bound to produce those comprised in the third schedule, on the ground that they con-

1841.

 SMITH
 v.
 The
 EAST INDIA
 Company.

tained confidential communications, which had passed between the Court of Directors and the Commissioners for the affairs of *India*, relative to the Plaintiff's claim, since the dispute between the parties had arisen, such communications having been made in compliance with the legal obligation, imposed upon the Court of Directors, to consult with the Commissioners before they admitted the claim.

The Vice-Chancellor of *England* having, on the usual motion, ordered the production of these documents, the *East India* Company now moved before the Lord Chancellor that that order might be discharged.

Mr. *Loftus Wigram* (in the absence of Mr. *Lloyd*), in support of the motion, called the attention of the Court to the stat. 3 & 4 *W. 4. c. 85.*, by which all the beneficial interest in the property, contracts, and engagements of the *East India* Company was transferred to the Crown for the service of the government of *India*, and all the debts and liabilities of the company were charged upon the *Indian* revenue; referring particularly to the 29th section, by which it was enacted “that
 “the Court of Directors should from time to time deliver to the Board of Commissioners for the affairs
 “of *India*, copies of all minutes, orders, resolutions, and
 “proceedings of all courts of proprietors general or
 “special, and of all courts of directors within eight
 “days after the holding of such courts respectively;
 “and also copies of all letters, advices, and dispatches
 “whatsoever which should at any time or times be received by the said Court of Directors or any committee
 “of directors, and which should be material to be communicated to the said board, or which the said board
 “should at any time require.”

He

He then observed that the documents in question were not only confidential communications, but communications which owed their existence to the obligation imposed by that enactment; and that, inasmuch as that obligation had been created for the public benefit, the documents were entitled to the same privilege of exemption as official communications between a governor, and a law officer, of a colony — orders given by a governor of a colony to a military officer — or a correspondence between an agent of government and a secretary of state — all of which had been held to be privileged on the ground of public convenience. (*a*)

1841.
SMITH
v.
The
EAST INDIA
Company.

Mr. *Turner* and Mr. *Stevens*, *contra*, observed that this was the first time that the privilege, allowed to official communications, had ever been claimed for a correspondence relating to mere commercial transactions: that all the authorities which had been cited on the other side related to communications of a purely political nature, of which a disclosure not only might, but must necessarily, have been productive of public mischief: that the relation between the Court of Directors and the Board of Control was more analogous to the ordinary relation of principal and agent, or trustee and *cestui que trust*, (*Heslop v. The Bank of England* (*b*), *Green v. Weaver* (*c*),) than to that which existed between two officers, or branches of administration, in the public service.

Mr. *L. Wigram*, in reply.

The

(*a*) See *Phillipps on Evidence*,
p. 387. 7th ed.

(*b*) 6 *Sim.* 192.
(*c*) 1 *Sim.* 404.

1841.

SMITH
v.
The
EAST INDIA
Company.
Dec. 23.

The LORD CHANCELLOR. (a)

The only question in this case is whether certain documents, being a correspondence between the court of directors of the *East India* Company, and the commissioners for the affairs of *India*, contained in the third schedule to the answer of the Defendants should be produced.

It was said that they ought not to be produced, because the correspondence was a confidential correspondence; but that is not, of itself, a sufficient reason for the nonproduction of documents which are referred to in an answer. It was then said that it was an official correspondence, and therefore privileged; but an official correspondence is not privileged as such, unless under particular and special circumstances: and therefore it becomes necessary to consider the act of 3 & 4 *W. 4. c. 85.*, on which the present claim to exemption is founded.

By that Act, all the territorial possessions of the *East India* Company are transferred from the *East India* Company to the Crown, to be held by the *East India* Company in trust, and to be governed and managed, for the benefit of the Crown. In addition to this, all the property of the *East India* Company, all their assets, are transferred to the Crown, to be managed by the *East India* Company in trust for the service of the government of *India*. The company are prohibited from carrying on any commercial transactions, except for the purpose of winding up their affairs, or for the purposes of the government of *India*. This is the state of the *East India* Company in consequence of the act of 3 & 4 *W. 4.*; but, in all those affairs, they are placed under the

(a) Lord Lyndhurst.

the superintendence, direction, and control of the Commissioners for the affairs of *India*; and in order that that superintendence and control should be exercised effectively and for the benefit of the public, it is necessary that the most unreserved communications should take place between the *East India* Company, that is, between the Directors of the *East India* Company, and the Board of Control. And accordingly, there are in the act of parliament, particularly I think in the twenty-ninth section, provisions by which the Directors of the *East India* Company are required to make communication of all their acts, transactions, and correspondence, of every description, to the Board of Control.

1841.

 SMITH
 v.
 The
 EAST INDIA
 Company.

Now it is quite obvious that public policy requires, and looking to the act of parliament, it is quite clear that the legislature intended, that the most unreserved communication should take place between the *East India* Company and the Board of Control, that it should be subject to no restraints or limitations ; but it is also quite obvious, that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved. I think, therefore, that these communications come within that class of official communications which are privileged, inasmuch as they cannot be subject to be communicated, without infringing the policy of the act of parliament and without injury to the public interests.

I am opinion, therefore, that the order of the Vice-Chancellor ought, on these grounds, to be discharged.

1841.

Nov. 5.
Dec. 8.

In the Matter of JOHN PLUMMER and WILLIAM WILSON Bankrupts.

A creditor, whose debt was secured by the joint and several covenants of two partners in trade, and also by a mortgage on part of the joint property, admitted to prove his debt against the separate estate of each, without surrendering or realising his mortgage security.

THIS was an appeal, in the form of a special case, from the Court of Review.

The material facts, as stated in the case, were, that previously to the issuing of the commission, the bankrupts carried on business in partnership as *West India* merchants, in the course of which the firm became indebted to *George Joad*, in the sum of 2000*l.* for monies lent, and in the further sum of 5998*l.* 13*s.* 4*d.* for the freight of ships, of which *Joad* was the owner. Being desirous of obtaining further advances, they assigned to *Joad* certain *West India* securities belonging to the firm, and entered into joint and several covenants for the payment of the 2000*l.* and any further sum or sums which *Joad* might afterwards advance to them; and about the same time they gave him a similar security for the payment of the 5998*l.* 13*s.* 4*d.*, and any further sums in which the firm might afterwards become indebted to him for freight, not exceeding 10,000*l.* The amount due from the firm to *Joad*, at the time of the bankruptcy, on the first-mentioned security was 10,014*l.* 7*s.* 5*d.*, and on the other security 10,742*l.* 4*s.* 5*d.*, in respect of which two debts he tendered a proof to the commissioners, for the gross sum of 20,014*l.* 7*s.* 5*d.*, against each of the separate estates of the bankrupts. The commissioners, however, disallowed the proof, and the judges of the Court of Review having, on two occasions, on which the case was subsequently brought before them (*a*), been divided in opinion,

(*a*) See 1 *Mont. Deac. & Deg.* 101.

opinion, it was eventually arranged that an order should be made, allowing the proof, without prejudice to the securities, in order that the question might be submitted, in the form of a special case, to the Lord Chancellor.

1841.

In re
 PLUMMER.

The case now came on to be argued,

Mr. *Russell* and Mr. *Bagshawe* in support of the appeal.

From the earliest times of administration in bankruptcy the rule has been, that a party cannot prove against the estate under distribution, so long as he has any part of the bankrupt's property in his hands. It is true that the securities in question are joint property; but that circumstance makes no difference, because joint property is partly the property of one partner and partly of the other, and the rule in bankruptcy, that the partnership property is not to be considered as constituting any part of the separate property of either of the partners until all the joint debts are paid, was only established with a view to an equitable distribution among different classes of creditors, and was not intended to interfere with the other rule before mentioned.

The only semblance of authority for the order now appealed from, is to be found in the marginal note to the case of *Ex parte Peacock* (a), which, however, does not correctly represent the principle of the decision; for it appears that that case was decided upon the ground that the joint estate, against which the proof was tendered, was the fund primarily liable, and that the separate estate, upon which the security had been given, was merely in the situation of a surety: and therefore, so far from supporting the order in question, that case is,
 to

(a) 2 Gl. & Jam. 27.

1841.

In re
PLUMMER.

to some extent, an authority against it, inasmuch as in the present case the debt, which is sought to be proved against the separate estate, was, in its origin, a joint debt. Independently however of that consideration, the decision in *Ex parte Peacock* is no authority for this order, that case being the converse of the present. Each partner has a qualified interest in the property comprised in this security, although it is not actually the separate property of either: whereas in the case of *Ex parte Peacock*, the separate estate, which was the subject of the security, could in no sense be said to be a part of the joint estate which was under administration.

To reconcile the principle, upon which this proof has been admitted, with Lord *Loughborough's* Order of 1794, it would be necessary to hold that that order applies only where the property comprised in the security belongs exclusively to the estate under administration. The Order, however, is general in its terms, and there is no authority for so limiting its construction.

Mr. *Swanston* and Mr. *Hall*, *contrà*, relied upon the following authorities, *Ex parte Parr* (a), *Ex parte Smith* (b), *Ex parte Free* (c), *Ex parte Rodgers* (d), *Ex parte Connell* (e), and *Ex parte Davenport* (g), *Ex parte Bowden*. (h)

Mr. *Bagshawe* (in the absence of Mr. *Russell*), in reply.

The

(a) 1 *Rose*, 76.

(b) 2 *Gl. & Jam.* 105.

(c) *Ibid*, 250.

(d) 1 *Dea. & Ch.* 38,

(e) 3 *Dea.* 201.

(g) 1 *Mont. D. & Deg.* 313.

(h) 1 *Dea. & Ch.* 135.

The LORD CHANCELLOR.

1841.

In re
PLUMMER.

Dec. 8.

This was a special case stated, under the act of parliament, by the Court of Review, for the opinion of this Court. [His Lordship then stated the facts, and proceeded as follows.] Upon these facts the question submitted to this Court is, whether *George Joad*, being a separate as well as joint creditor of the bankrupts, is entitled to prove his whole debt against their separate estates; or whether he is entitled to prove only for the balance which shall remain due to him after realising the security which he holds upon their joint estate.

Now what are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realising his security. For the principle of the bankrupt laws is, that all creditors are to be put on an equal footing, and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt; but, if he has a security on the estate of a third person, that principle does not apply: he is in that case entitled to prove for the whole amount of his debt, and also to realise the security, provided he does not altogether receive more than 20s. in the pound.

That is the ground on which the principle is established; it is unnecessary to cite authorities for it, as it is too clearly settled to be disputed; but I may mention *Ex parte Bennett* (a), *Ex parte Parr* (b), and *Ex parte Goodman* (c), in which it has been laid down.

The

(a) 2 Atk. 527.

(c) 3 Mad. 373.

(b) 1 Rose, 76.

1841.


In re
PLUMMER.

The next point is this. In administration under bankruptcy, the joint estate and separate estate are considered as distinct estates: and accordingly it has been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded, and that case was decided first by Sir *J. Leach* and afterwards by Lord *Eldon*, and has since been followed in *Ex parte Bowden*. (a) Now this case is merely the converse of that, and the same principle applies to it.

On these grounds I am of opinion that the creditor is entitled to prove his whole debt, without giving up his security, that security being no part of the estate under administration; and therefore, that the order of the Court below was right; but as the point is one upon which the Judges of that Court have been divided in opinion, on two occasions on which it has been brought before them, I think it is not a case for costs on either side.

(a) 1 *Dea. & Ch.* 135.

1841.

LLOYD v. WAIT.

Nov. 11, 12.

15. 24.

Dec. 9.

1842.

Jan. 25.

THE bill was filed by the Plaintiff, as heir at law of *Martin Lloyd*, who had died intestate in the year 1837, having mortgaged his real estate for a term of 500 years, to secure the sum of 1000*l*.

The Defendants, who were of the family of the intestate's mother, were his administrators. And the bill alleged that one of them, *John Wait*, being aware of the Plaintiff's title, and in order to defeat it or to obtain an undue advantage over him in any attempt which he might make to recover possession, had lately paid off the mortgage and taken an assignment of the term, and had prevailed upon the tenants of the estate to pay their rents to him, and that he had also possessed himself of the title deeds. And it prayed a declaration that the Plaintiff was entitled, as heir at law of the intestate, to redeem

A suit for the redemption of a mortgage having been instituted by a party claiming as heir at law of the mortgagor, who had died intestate, against a party who also claimed to be the heir at law, and who had got possession of the estate by obtaining an assignment of the mortgage term after the notice of the Plaintiff's

claim; the Court, at the hearing, made an immediate decree for redemption, refusing the Defendant an issue to try the Plaintiff's title, although it depended upon a long and complicated pedigree, the pedigree being established to the satisfaction of the Court by documentary evidence, and the Defendant having entered into no evidence in support of his own claim to the heirship.

Semble, that the Court would have in like manner refused an issue, had the Plaintiff made out only a *primâ facie* case in support of his title, inasmuch as the Defendant, having obtained possession as mortgagee, was, in this suit, to be considered as filling that character only, and a decree against him in that character would not preclude him from asserting his title as heir at law in another proceeding.

In a suit for redemption by the heir of a mortgagor against the assignee of the mortgagee, who was also the personal representative of the mortgagor, the Court, besides the usual decree for redemption, declared the Plaintiff entitled to have the balance which should be found due from him, and which should be paid by him to the Defendant, in respect of the mortgage debt, interest, and costs of the redemption, repaid to him out of the personal estate of the mortgagor in a due course of administration, and decreed accordingly, the bill being properly framed with a view to such relief.

An entry in an old account of burial fees received by the sexton of a large parish, by which he charged himself with the receipt of a certain sum for the burial of one *Joseph Lloyd*, described as "in *Wells Street*," admitted as evidence that a person of that name, who was proved by the parish register of burials to have been buried there on the day on which the entry bore date, resided in *Wells Street*.

1841.



LLOYD
v.
WAIT.

the mortgage; that the amount of the rents received by the Defendant, *John Wait*, might be set off against the amount due upon the mortgage; and that, upon payment of what should then remain due, either out of the personal estate of the intestate, which it prayed might be applied to that purpose, or, if that should be insufficient, by the Plaintiff personally, the Defendant *John Wait* might be decreed to assign the term, and deliver up the title deeds to the Plaintiff.

The Defendant, *John Wait*, by his answer denied the Plaintiff's title, and stated his belief that he was himself the heir at law of the intestate, and insisted that he was entitled, in that character, to the equity of redemption of the estate. He admitted, however, that he was aware of the Plaintiff's claim when he took the assignment; and that upon the execution of the assignment he had applied in the usual manner to the tenants of the estate to pay their rent to him, which they had accordingly done; but he denied that his object in taking the assignment was to defeat the Plaintiff's claim, or to obtain any undue advantage over him.

The only question in the cause was, as to the Plaintiff's title as heir at law. In support of his pedigree, which was extremely complicated, being traced through a common ancestor of the fourth generation back, the Plaintiff entered into a great deal of documentary as well as some parol evidence, part of which went to prove that the families composing the ascending and descending lines of the pedigree, and both of which, it appeared, had removed from *Gloucestershire*, where the common ancestor had resided, to *London*, about the middle of the last century, had, down to a certain period, kept up an intercourse together, and mutually acknowledged each other as relations. . On the other hand,

hand, the Defendant, *John Wait*, examined several witnesses for the purpose of shewing that the intestate had, during his lifetime, held no intercourse with the Plaintiff's family, nor had ever referred to them when enumerating his relations: but the Defendant, entered into no evidence in support of his own claim to be heir at law; and it was proved that shortly after the filing of the bill the Plaintiff had by letter applied to him to consent to an immediate decree, directing an issue for the purpose of trying the Plaintiff's title as heir at law, and that that offer had been rejected.

1841.

 LLOYD
 v.
 WAIT.

The cause now came on to be heard before the Lord Chancellor, and the only question was, whether the Plaintiff's heirship was sufficiently made out to entitle him to an immediate decree for redemption, or whether an issue should be directed.

The *Solicitor-General*, Mr. *Girdlestone*, and Mr. *Shebbare*, for the Plaintiff, contended that the evidence, as it stood, was sufficient to warrant an immediate decree according to the prayer of the bill; and they cited the following cases: *Short v. Lee* (a), *Pym v. Bowreman* (b), *Nicol v. Vaughan* (c), *Newman v. Milner*. (d)

Mr. *Richards*, Mr. *Sharpe*, and Mr. *Roupel*, for the Defendant *John Wait*, cited *Moons v. De Bernales* (e), *Mason v. Mason* (g), and *Burkett v. Randell* (h), and insisted, upon the authority of those cases, that an issue ought to be directed. They argued that it was not fit that a party should be stripped of his estate until his

(a) 2 J. & W. 464. See pp. 496. 502.

(b) 3 Swanst. 241. n.

(c) 5 Bligh. N. S. 505.

(d) 2 Ves. jun. 483.

(e) 1 Russ. 301.

(g) 1 Mer. 308.

(h) 3 Mer. 466.

1841.

LLOYD

v.

WAIT.

his title had been negatived by the verdict of a jury; more especially where the question between the parties turned upon a complicated pedigree, that being a matter, for the investigation of which the mode of taking evidence in this Court was peculiarly ill-adapted. That a trial at law was the more necessary in this case, because upon one very material point, viz., the alleged intercourse between the families composing the ascending and descending lines of the pedigree, there was a direct conflict of evidence: besides which, there were various links in the chain of documentary evidence which depended for their admissibility and effect upon parol testimony, and which could not therefore safely be relied on until that testimony had been sifted by cross examination.

Mr. *Robertson* appeared for the other Defendant.

The *Solicitor-General* in reply said, there might perhaps be some foundation for the argument on the other side, if this had been a bill of ejectment instead of being a bill for redemption of a mortgage term: it might be true that an heir would be entitled to an issue as a matter of right, before the Court would strip him of an estate which he claimed in that character. (a) But that was not the situation of the Defendant in this case; for it was beyond dispute that he had got possession of the estate as mortgagee, and a court of equity would not allow a party to gain an advantage over his competitor in title by a mere trick, and after having acquired possession of an estate in one character to insist upon retaining it in another.

In

(a) *Daniell, Ch. Prac.* vol. ii. p. 729.

In the course of the hearing, the following question arose upon a point of evidence.

1841.

LLOYD

v.

WAIT.

The object was, to identify one *Joseph Lloyd*, who was proved by the registrar of burials to have been buried in the parish of *St. James's, Westminster*, on the 22d *May* 1761, with a person of the same name who appeared, by the rate books, to have been rated, in that year, for a house in *Wells Street* in the same parish. The evidence tendered, was an entry in a book produced from the vestry of the parish church, and purporting to have been kept by the sexton, for the period in question, in compliance with certain parochial regulations, for the purpose of entering the burial fees received by him, and for which he was accountable to the rector. The entry was as follows:—

“*Joseph Lloyd*, in *Wells Street*, Friday 22d. Fever. 1*l.* 19*s.*”

Mr. *Richards* objected to its being received, on the ground that the residence of the party was immaterial to the purpose for which alone the entry had been made, or could be received in evidence, namely, that of recording the receipt of a certain sum for the burial of a certain person within the parish.

Mr. *Girdlestone*, *contra*, cited the following cases from *Phillipps on Evidence* (a):—*Warren v. Grenville* (b), *Barry v. Bebbington* (c), *Higham v. Ridgway* (d), *Stead v. Heaton*. (e)

The

(a) P. 255.

(b) 2 Str. 1129.

(c) 4 T. R. 515.

(d) 10 East, 118.

(e) 4 T. R. 669.

1841.

LLOYD
v.
WAIT.

The LORD CHANCELLOR.

The object of the entry is to record the receipt of a certain sum in respect of the burial of a particular individual. Who is that individual? *Joseph Lloyd*. That is not sufficient to identify a person in such a parish as *St. James's*; and he is accordingly entered as *Joseph Lloyd* in *Wells Street*. The residence of the party, as well as his name, is necessary for the purpose of identification. I will look into the cases that have been cited; but, in the meantime, I shall admit the evidence.

His Lordship did not afterwards advert to the point.

The LORD CHANCELLOR now delivered judgment.

This was a bill filed by the Plaintiff *Richard Lloyd*, against a personal representative of one *Martin Lloyd*, who had obtained an assignment of a mortgage: and the object of the bill was to redeem the mortgage. The principal discussion was upon a matter of evidence, as to whether the Plaintiff had or had not made out his title as heir at law of *Martin Lloyd* the intestate. But it was contended that, under the circumstances of the case, it was proper that the Defendant should have the option of taking the opinion of a jury on that point, and of contesting the right of the Plaintiff in a court of law.

The first question, then, to be considered, is a question of fact, as to the pedigree. [His Lordship then took an elaborate review of the documentary evidence, exclusive of those parts of it which, depending for their admissibility and effect upon parol testimony, had been the subject of dispute at the bar. And he concluded by

by declaring it as his opinion that that evidence alone was not only sufficient to prove the pedigree, but that it also went far to prove an intercourse of relationship between the families composing the ascending and descending lines of the pedigree — a circumstance, his Lordship observed, which was not immaterial; because, as they both appeared to have removed to *London* about the same period, the case would have been one of suspicion, unless some intercourse had been proved to have subsisted between them subsequently to that time. As to the parol evidence upon that point, his Lordship, after taking a review of it, concluded by observing that there was no necessary inconsistency in it, inasmuch as the Plaintiff's witnesses referred to a different period from those of the Defendant; and the estrangement between the two families during the more recent period, to which the latter testimony referred, might easily be accounted for by the difference which appeared to have taken place in their respective circumstances. His Lordship then proceeded as follows: —] The parol evidence then is confirmatory of the documentary evidence, which, in itself, is exceedingly strong: and the result is, that, in my opinion, the Plaintiff's case is clearly made out and established.

1841.
LLOYD
v.
WAIT.

But then it is said that the Defendant is entitled to have an opportunity of contesting the claim of the Plaintiff at law. Let me, however, direct attention to the circumstances in which the Defendant stands. He was one of the personal representatives of the intestate; there was the mortgage outstanding; he knew of the claim of the Plaintiff; — he admits that in his answer — and, knowing of the claim of the Plaintiff, he paid the principal and interest, and obtained an assignment of the mortgage. He says he did not do it to defeat the Plaintiff's claim; but he knew of the claim: he obtained the assignment,

1841.

LLOYD


v.

WAIT.

and the effect of that was, to impede the claim. After he had obtained the assignment, he says he gave notice to the tenants in the usual way, informing them that he had obtained it, and requiring payment of the rents; they paid the rents, and have continued to pay them, accordingly. He therefore obtained possession in the character of mortgagee. It is true that in his answer he says, "though I acquired the possession as mortgagee, I claim the equity of redemption as heir at law of the intestate;" but he gives not the slightest evidence to shew that he is heir at law. He holds the estate, therefore, merely in the character of mortgagee, and, standing as he does in that situation, and a strong case being made out against him, where even a *prima facie* case would have been sufficient, he cannot, as a matter of right, be entitled to have a trial at law.

Having, then, no such right, the Court is asked, in the exercise of its discretion, to allow him a trial. For what purpose? He does not state what facts are to be proved or what are to be controverted; but he insists generally that the evidence ought to be sifted on cross-examination. I do not think, however, that, in a case like this, the Court would be justified in allowing the Defendant a trial at law before a decree for redemption is made. I think it would be a very improper exercise of the authority of the Court, and a very unsound exercise of its discretion, which would create great delay; and nobody can look at these proceedings and the nature of the evidence produced, without seeing that the expense consequent upon it would be enormous. But what is the situation of the Defendant? If he has really a title as heir at law, this decision will not preclude him from asserting it hereafter at law or in equity, as he may be advised, according to the nature of the case. The only thing determined by this decree is the

the redemption of the mortgage: he will have his principal and interest repaid; and, after that, he will be in a situation to contest the Plaintiff's claim. He has the less reason to complain, because from the correspondence which took place between the parties it appears that he might, if he had thought proper, have had the question in the first instance decided at law. He did not choose to do so; and I think that under such circumstances the Court, being satisfied that the pedigree has been satisfactorily established, ought not to allow him to have a trial at law before it pronounces a decree in this cause for the redemption of the mortgage.

1841.

 LLOYD
 v.
 WAIT.

The case was afterwards spoken to upon the minutes of the decree, it being contended on the part of the Defendant that the only decree which could be made in this suit was the common decree for a redemption of the mortgage, and that, in order to obtain the ulterior relief prayed by the bill, it would be necessary for the Plaintiff first to pay off the mortgage debt, and then to file a bill in the nature of a supplemental bill on behalf of himself and all the other creditors of the intestate; inasmuch as his only title to such relief at present was an equity which was subject to the claims of the general creditors, and the Court had, in this suit, no means of administering the estate in such a manner as to indemnify the administrators against those claims: it was further contended that, at all events, that relief could not be obtained in the absence of the next of kin of the intestate, they being the parties beneficially entitled to the surplus of the estate after payment of the general creditors, and consequently interested in opposing the Plaintiff's claim.

1842.
 Jan. 25.

1841.

LLOYD
v.
WAIT.

On the other hand, it was insisted that the whole of the relief prayed by the bill might be obtained in the present suit. It was true that the Plaintiff's equity was subject to the claims of the general creditors; but so was the claim of a legatee; and yet it was never doubted that in a suit by a legatee such a decree might be made for the payment of his legacy, as would afford the personal representatives full protection against the claims of creditors.

In the course of the discussion the following authorities were cited:—*Hale v. Cox* (a), *Rider v. Wager* (b), *Waring v. Ward* (c), *Hamilton v. Haughton* (d), *Seton on Decrees*. (e)

On the conclusion of the argument,

The LORD CHANCELLOR said, he was clearly of opinion that the objection for want of parties was not maintainable: and that, with respect to the other objection, he would make inquiry as to the practice.

On a subsequent day his Lordship said, he was of opinion that no supplemental bill was necessary, and that, unless assets were admitted, an account must be taken of the personal estate.

By the decree, as drawn up, it was declared that the Plaintiff, as heir at law of the intestate *Martin Lloyd*,
was

(a) 3 Bro. C. C. 322.


(b) 2 P. Wms. 328.; see p
335.

(c) 5 Ves. 670.

(d) 2 Bligh, 169.

(e) P. 52.

was entitled to redeem the premises comprised in the mortgage; and, —after the usual decree for redemption of the mortgaged premises, upon payment by the Plaintiff to the Defendant *John Wait* of the balance, if any, which the Master should certify to be due to him for principal and interest upon the mortgage, and his costs as mortgagee, after deducting therefrom, in the usual manner, what should be found to have been received by the said defendant on account of the rents and profits of the mortgaged estate — It was further declared, that the Plaintiff was entitled to have such balance, if any, as the Master should find to be so due, and which should be or have been paid to the said Defendant, *John Wait*, by the said Plaintiff, for principal, interest, and costs as aforesaid, and also such amount as should be or have been retained by the said Defendant, *John Wait*, in or towards satisfaction of his said principal, interest, and costs out of the said rents and profits, repaid to him the said Plaintiff out of the personal estate of the said intestate in a due course of administration. After which followed the usual consequential directions for taking the accounts of the personal estate of the intestate and of his debts, other than the said mortgage debt, advertising for creditors, &c.

1841.

 LLOYD
 v.
 WAIT.

Reg. Lib. 1841. B. f. 401.

1841.



1841.

Nov. 8. 10. 16.

1842.

Jan. 31.

A testator bequeathed 1700*l.* stock to trustees, in trust to pay the dividends to J. C. and S. his wife, during their lives, and the life of the survivor, and after their decease, then in trust to transfer or pay over the stock unto their children, in such shares and proportions as the survivor of them, J. C. and S. his wife, by his or her last will should direct or appoint. At the death of the testator, J. C. and S. had three children living. After the deaths of S. and two of those children, J. C., by will, appointed the whole fund to the only surviving child. Held, a good appointment.

WOODCOCK v. RENNECK.

IN this case, which came before the Court upon an appeal from a decree of the Master of the Rolls, the Lord Chancellor delivered the following judgment : —

The LORD CHANCELLOR.


This is a question arising out of the will of *William Linton*. The testator bequeathed, among other things, to his trustees the sum of 1700*l.* 4 per cent. Bank annuities, in trust to pay the dividends to *Joseph Christie* and *Sarah* his wife during their lives, and the life of the survivor; and after their decease then in trust to transfer or pay over the said stock unto their children, in such shares and proportions as the survivor of them, the said *Joseph Christie* and *Sarah* his wife, by his or her last will should direct or appoint.

The testator died in the year 1817. At the time of his death there were three children of *Joseph Christie* and *Sarah* his wife living. One of them died in the following year, 1818. Another, *Joyce Linton Woodcock*, the wife of the Plaintiff, died in the year 1832. *Sarah*, the wife of *Joseph Christie*, died in the year 1818. *Joseph Christie* having survived his wife, and having only one child then living, namely, *Eleanor*, wife of the Defendant *Renneck*, in the year 1832 made his will, and executed the power given to him by the will of *William Linton*, and thereby appointed the whole of the said sum of 1700*l.* in favour of his surviving daughter *Eleanor Renneck*.

It

It is contended that *Joseph Christie* had no authority under the will of *William Linton* to make such an appointment. This depends upon the true construction and meaning of the above clause, whereby the testator directed his trustees, after the decease of the survivor of *Joseph Christie* and *Sarah* his wife, to transfer or pay over the said stock unto their children, in such shares and proportions as the survivor of them by his or her last will should direct or appoint. When the testator directed that, after the death of the survivor, the transfer should be made to their children in such shares as the survivor should appoint, he must, I think, be taken to have meant children among whom the shares were capable of being appointed by the donee of the power. But as the power was to be executed by will, those children could only be such as were living at his death, that is, at the death of the survivor of *Joseph Christie* and *Sarah* his wife. In this case one child only survived, but that creates no difficulty; for it is clear that in the case of a power to appoint to surviving children, the power might be executed in favour of a single surviving child.

It was contended on the part of the Plaintiff, that this was a vested interest in all the children living at the death of the testator *William Linton*. For it was said that the words of the bequest in favour of the children were, in substance, the same as those which were made use of in the bequest to *Joseph Christie* and *Sarah* his wife, who, it was admitted, took a vested life interest under the will. But to support this argument a part only of the words are taken, omitting the subsequent portion of the clause, upon the true construction of the whole of which the question must depend.

1841.

 WOODCOCK
 v.
 RENNECK.

This

1841.

WOODCOCK
v.
RENNECK.

This case gave rise to much discussion at the bar, and many authorities (a) were cited on both sides; but the question at last resolves itself into very narrow limits. I think the interpretation I have put upon the clause is the true interpretation, that it is consistent with the principles to be extracted from the cases that were referred to, and, as it accords with the judgment of the Master of the Rolls, the appeal must be dismissed with costs.

Mr. *Girdlestone* and Mr. *Roupell* appeared for the Plaintiff, in support of the appeal.

Mr. *Richards*, Mr. *Turner*, Mr. *Parry*, Mr. *Dixon*, Mr. *Busk*, and Mr. *Taylor*, for the other parties.

(a) The cases cited in the argument were the following:—*Hockley v. Mawbey*, 1 *Ves.* jun. 143.; see p. 150.; *Madoc v. Jackson*, 2 *B. C. C.* 588.; *Casterton v. Sutherland*, 9 *Ves.* 445.; *Vanderzee v. Aclom*, 4 *Ves.* 771.; *Campbell v. Sandys*, 1 *Sch. & Lef.* 281.; *Reade v. Reade*, 5 *Ves.* 744.; *Boyle v. Bishop of Peterborough*,

1 *Ves.* jun. 299.; *Butcher v. Butcher*, 1 *V. & B.* 79.; *Houstoun v. Houstoun*, 4 *Sim.* 611.; *Bray v. Hammersley*, 5 *Sim.* 515.; *M'Ghie v. M'Ghie*, 2 *Madd.* 368.; *Walsh v. Wallinger*, 2 *R. & M.* 78.; *Crook v. Brooking*, 2 *Vern.* 50.; *Needham v. Smith*, 4 *Russ.* 318.; *Kennedy v. Kingston*, 2 *J. & W.* 431.

1841.

VAUGHAN v. BUCK.

Nov. 16. 20.

HENRY WILLIAM VAUGHAN made his will, dated 12th of *May* 1830, as follows: — “First, I will and bequeath to my beloved wife *Elizabeth Vaughan*, the whole of my property during her natural life, and after to be equally divided between my surviving children, excepting a moderate sum, say 30*l.* or 40*l.*, to put my eldest son *Henry Vaughan* apprentice to any trade that he may chance to fancy, and the same to my second son *Charles Vaughan*, should he live. I will and bequeath to my two sons *Henry Vaughan* and *Charles Vaughan* the sum of 100*l.* each on their becoming of age. I also will and bequeath the sum of 100*l.* to each of my daughters *Sarah Vaughan* and *Emma Vaughan*, when they become of age, should they live. I give to my son *Henry* my watch and some of my books, such as he may like best, or his mother may think most use to him. My furniture, clothes, books, &c. I leave to my wife. The property, my house, 21. *North Street, St. Marylebone*, let on lease at 48*l.* a year, 1000*l.* new 4 per cent., 1500*l.* in the 3 per cent. consols, 645*l.* in the threes reduced, and 20*l.* per annum in the long annuities, all this I give to my wife, with the residue and interest, should there be any.”

The testator died in the month of *March* 1838. His widow took out letters of administration with the will annexed, and afterwards married the Defendant *William James Buck*. The bill was filed by *Henry Vaughan*,

A testator began his will by bequeathing the whole of his property to his wife for life, and afterwards to be equally divided between his children. He then gave to each of his children and to his wife some pecuniary and specific legacies, and afterwards bequeathed as follows. “The property, my house, 21. *North Street, St. Marylebone*, let on lease at 48*l.* a year, 1000*l.* new 4 per cent., 1500*l.* in the 3 per cent. consols, 645*l.* in the threes reduced, and 20*l.* per annum in the long annuities, all this I give to my wife, with the residue and interest, should there be any.”

one Held, that the widow took a life interest only in the general residue, including the particulars enumerated in the concluding clause, but that of those particulars she was entitled to the enjoyment in specie.

1841.
VAUGHAN
v.
BUCK.

one of the testator's sons, against his mother and her second husband, and the other children of the testator, for the purpose of having the rights of all parties interested under the will ascertained.

In addition to the house No. 21. *North Street*, which was leasehold, the testator was at the time of his death possessed of another leasehold house in the same street, which he had purchased after the date of his will. The rest of his property, at the time of his death, exclusive of his furniture, clothes, books, &c. which were of small value, consisted of some shares in a gas light and coke company, and of the following sums of stock, viz.: 1500*l.* new 3*l.* 10*s.* per cent. bank annuities, 5600*l.* 3*l.* per cent. consols, 1590*l.* 3*l.* per cent. reduced, and 24*l.* per annum in the long annuities.

By the decree of the Vice-Chancellor of *England*, made, upon the hearing of the cause, on the 24th *May* 1841, it was declared that the Defendant *Elizabeth Buck*, (formerly *Elizabeth Vaughan*), was entitled during her natural life to the income of the general residue of the testator's estate; and that the house in *North Street*, and the several sums of new 4*l.* per cent. annuities, 3*l.* per cent. consolidated annuities, 3*l.* per cent. reduced annuities, and long annuities, mentioned in the will, or such of them as the testator should appear to have possessed at his decease, formed part of such general residue. And it was ordered, (amongst other things), that the above-mentioned shares in the gas light and coke company, and the 24*l.* long annuities, and the leasehold estates of the testator should be sold, and that the proceeds should be invested in the purchase of bank 3*l.* per cent. annuities, subject to the further order of the Court.

From

From that part of the decree the Defendant *W. J. Buck* appealed, and the appeal now came on to be heard.

1841.

 VAUGHAN
 v.
 BUCK.

Mr. *Richards* and Mr. *Rogers*, in support of the appeal, contended that the effect of the first clause in the will, giving the property over to the testator's children upon the decease of his wife, was controlled by the concluding sentence, and that, consequently, the widow was entitled, absolutely, either to the entire residue of the testator's property, or at least to the particulars enumerated in the concluding clause. Supposing, however, the widow to take no more than a life interest in any part of the property, they insisted that there was an obvious intention that those enumerated particulars should be enjoyed by her in specie, and that from the manner in which the gift of those particulars was coupled with that of the residue, it was clear that the testator intended this residue, whether it referred to all the remainder of his property, or to property *ejusdem generis* with the parts enumerated, to be enjoyed in the same manner. They cited *Howe v. Lord Dartmouth* (a), *Alcock v. Slopers* (b), *Collins v. Collins* (c), *Bethune v. Kennedy* (d), *Pickering v. Pickering* (e), *Lichfield v. Baker* (g), *Goodenough v. Tremamondo*. (h)

Mr. *Keene*, for the Defendant *Elizabeth Buck* (who appeared separately from her husband), submitted to the judgment of the Court.

Mr. *Girdlestone* Mr. *Bethell*, Mr. *Steere*, and Mr. *Wilkinson*, for the testator's children, contended that the concluding

(a) 7 *Ves.* 137.

(b) 2 *Myl. & Keen*, 699.

(c) *Ibid.* 703.

(d) 1 *Myl. & Cr.* 114.

(e) 4 *Myl. & Cr.* 289.

(g) 2 *Beav.* 481.

(h) *Ibid.* 512.

1841.

VAUGHAN
v.
BUCK.

cluding words of the will did not constitute a distinct and substantive bequest, but were only a repetition of the gift already made by the first clause, with an enumeration of the particulars intended to be comprised in it. On the question of conversion, they argued that the enumeration of particulars being merely intended to describe what the general residue consisted of, did not affect the residuary character of the gift. *Mills v. Mills.* (a) With respect to the case of *Collins v. Collins*, cited on the other side, they said that what was reported as a decision was in fact a mere dictum, inasmuch as the case was not ripe for an adjudication upon the point of conversion, and, accordingly, the decree of Sir *J. Leach*, as drawn up, was confined to a reference to the Master to take the usual accounts of the testator's estate. (b) They also stated that, upon the case coming on for further directions before Lord *Langdale*, a compromise took place, and an order was taken, by consent, for the sale of the property in dispute.

Mr. *Richards* in reply.

Nov. 16.

The LORD CHANCELLOR.

This is a question arising out of the will of *William Henry Vaughan*. The testator appears to have been an illiterate person, and to have drawn up the will himself. It is difficult to form a very confident opinion as to the intention of the testator in an instrument so framed.


He begins by bequeathing to his wife the whole of his property during her natural life, and afterwards to be divided

(a) 7 *Sim.* 501.

case. Reg. Lib. 1832, A. p.

(b) This appears to be the 3497.

divided between his surviving children, excepting two small sums for the purpose of putting out his sons as apprentices to some trade. He then gives 100%. to each of his said sons, and the same sum to each of his two daughters. His furniture, clothes, books, &c., which are stated in the answer to have been of small value, he gives to his wife. The total amount of these legacies bears an inconsiderable proportion to the property disposed of by this will. After these bequests, the will proceeds thus: [His Lordship then stated the concluding clause of the will, and proceeded as follows:—]

1841.

 VAUGHAN
 v.
 BUCK.

It is contended on the part of the Appellant, that the widow took an absolute interest in the property mentioned in this clause. I am of opinion that this is not the true construction of the will, and that such was not the intention of the testator.

The clause extends to the whole of the testator's property, except the small legacies which he had before given. It comprehends not only the property which he particularly mentions, but also the residue, which is expressly named. It is difficult to suppose that the testator, after having, a few lines before, given the whole of his property to his wife for life, should have intended by this clause to give the same property to her absolutely. It is not reasonable to put such a construction upon the will, if it admits of any other interpretation. But I think it does admit of an easy and consistent construction.

The testator had, in the former part of his will, given the whole of his property in general terms to his wife for her life; and then, after making a few inconsiderable exceptions, (inconsiderable as compared to the whole amount of the property), he gives the property,
 (referring

1841.

VAUGHAN

v.

BUCK.


(referring evidently, I think, to the former part of the will, and stating particularly of what that property consisted), to his wife, with the residue and interest, should there be any—meaning, as I understand it, merely to enumerate in detail what he had before given in general terms, and not to make a new disposition of his property. This appears to me a very natural construction, and it reconciles the two clauses of the will. I am of opinion, therefore, that the widow took only a life interest in the property in question.

The next point that has been raised is, whether the whole of the property is to be converted, or whether a part of it is to be enjoyed by the widow in specie. The question is one of intention, and is material only as regards the leasehold house specifically mentioned and the 20*l.* long annuities. We ought, I think, to put the same construction upon the will in this respect, as if the enumeration of the property had been inserted in the first clause—as if it had run thus: “I give the whole of my property, viz., my house, 21. *North Street, Marylebone*, let on lease at 48*l.* a year, 1000*l.* new 4 per cents., 1500*l.* in the 3 per cent. consols, 645*l.* in the 3 per cents. reduced, and 20*l.* per annum in the long annuities, with the residue and interest, if there should be any, to my wife for life, and after to be divided equally between my surviving children.”

With respect to the house, the bequest is clearly specific; and as to the 20*l.* per annum long annuities, they constitute one of the items in the testator's property existing at the date of the will, and which by this description he bequeathed to his wife. Supposing, therefore, which I presume to be the case, that this sum formed a part of the 24*l.* per annum long annuities which the testator held at his death, I think the widow

is

is entitled to this in specie. The case of *Bethune v. Kennedy* (a) is similar in principle, and corresponds nearly in its circumstances with the present.

1841.

 VAUGHAN
 v.
 BUCK.

With respect to the new 4 per cents., the testator had no such stock at the time of his death. Independently, therefore, of other considerations into which it is unnecessary to enter, it is sufficient to observe that there is nothing to shew beyond mere conjecture, that the $3\frac{1}{2}$ per cents. were a substitute for the new 4 per cents. (b), upon which alone this part of the claim was founded.

The decree will, therefore, be varied so as to give the widow the enjoyment of the leasehold premises mentioned in the will, and the 20*l.* long annuities, in specie during her life.

(a) 1 *Myl. & Cr.* 114.

(b) The act for converting the new 4 per cent. annuities into new $3\frac{1}{2}$ per cent. annuities (11 *G. 4. c. 13.*) was passed on the 3d of *May* 1830, a few days be-

fore the date of the will, the conversion being thereby made to take effect from the 5th of *July* following. This act, however, was not referred to in the argument.

1841.

Dec. 16.

JONES v. SEGUEIRA.

It is irregular to reply to a plea of the pendency of a former suit for the same matter, the proper course being to obtain a reference of the plea to the Master.

THE bill in this cause was filed on the 16th of *April* 1841, and on the 12th of *June* 1841 two of the Defendants put in a plea, by which they pleaded the pendency of a suit in the Exchequer between the Plaintiffs and themselves for the same matters.

The Plaintiffs, instead of obtaining a reference of this plea to the Master, according to Lord *Clarendon's* Order (*a*), filed a replication on the 23d of *June* 1841, and on the 26th of the same month they served a subpoena to rejoin.

On the 17th of *July* 1841, the same Defendants served the Plaintiffs with notice of a motion to dismiss the bill. The motion was made before the Vice-Chancellor of *England*, on the 11th of *November* 1841, when it was refused by his Honor, with costs.

The Defendants now moved, by way of appeal, before the Lord Chancellor, that the Vice-Chancellor's order might be discharged, and the bill dismissed, with costs.

Mr.

(*a*) "The dependency of a former suit for the same matter is also a good plea; and therefore the Defendant shall not be put to set it down with the Registrar, but if the Plaintiff be not satisfied therewith, the same shall be referred to one of the Masters of the Court to certify the truth thereof, and if it shall be determined against the Plain-

tiff, he shall pay 5*l.* costs to the Defendant."

"But such reference shall be procured by the Plaintiff, and a report thereupon within one month after the filing of such plea, otherwise the bill to stand dismissed of course, with the ordinary costs of seven nobles." *Beames's Orders*, p. 176.

Mr. *Wakefield* and Mr. *Teed*, in support of the motion, relied upon the terms of Lord *Clarendon's* Order, and cited *Tarleton v. Barnes.* (a)

1841.
JONES
v.
SEGUEIRA.

Mr. *Cooper* and Mr. *Turner*, for the Plaintiffs.

The plea in this case tenders two issues: first, that a former suit is pending between the same parties; secondly, that both suits are for the same matters; whereas the form which is observed by the registrars in drawing up an order for the reference of a plea of this kind, according to the existing practice, and which has been followed by them for as long a period as the practice can be traced, confines the inquiry to the second issue only, the terms of the order merely requiring the Master to look into the two bills, and see whether they are for the same matters. The only mode, therefore, of raising the whole question, is, by replying to the plea; and the Vice-Chancellor, on that ground, held the replication to be proper in the present case. It may be admitted that a reference, made in strict pursuance of Lord *Clarendon's* Order, would embrace both the points; but the practice has not been in conformity with that Order, which must, in fact, be considered as obsolete.

The motion is, moreover, wrong in point of form. A Defendant cannot move to dismiss a bill after the cause is at issue. The application ought to have been, to take the replication off the file.

[*The* LORD CHANCELLOR.

Under Lord *Clarendon's* Order the Defendants could not move to dismiss until the expiration of a month from the filing of the plea. Your *subpœna* to rejoin was served

(a) 2 *Keen*, 632. 635.

CASES IN CHANCERY.

within the month. Can any thing you do in the interval affect the Defendants' rights under the order?]

At all events, the motion ought to have been a motion of course.

Mr. *Wakefield*, in reply, mentioned the case of *Baker v. Bird* (a), as shewing that Lord *Clarendon's* Order was still recognised and acted upon. With regard to the objection, that the motion had been made upon notice, he contended that it only affected the question of costs.

The LORD CHANCELLOR.

The terms of Lord *Clarendon's* Order appear to me to be very clear and precise, and to embrace the whole question sought to be raised by the Plaintiffs. It was contended that the Order had become obsolete, but the case in *Vesey's Reports* shews that this is not the fact. The ordinary form of the reference to the Master does not, I think, decide any thing. The order of reference is obtained by the Plaintiff, and he may admit as much of the plea as he likes, and take a reference as to the remainder. In most cases the pendency of a former suit would not be disputed, and this sufficiently accounts for the order of reference being drawn up in the manner stated. The Vice-Chancellor's order must, therefore, be discharged, and the bill be dismissed; but the Defendants' application to the Vice-Chancellor ought to have been by a motion of course, and they must, therefore, pay the costs of bringing the Plaintiffs before the Court.

(a) 2 *Ves.* jun. 672.

1841.

PRICE v. NORTH.

Nov. 22.
Dec. 20.

THIS was a creditor's suit, instituted in the Court of Exchequer, for the administration of the estate of the testator *Roderick Gwynne*, and for the execution of the trusts of his will.

The will commenced in these words :—" First, I will that all my just debts, funeral expenses, and the costs and charges of proving this my will, be fully paid and satisfied." The testator then devised all his real estates to his daughter and her issue in strict settlement. He then gave to his servant *David Armstrong* 50*l.* and all his clothes. And all his ready money, money in the funds, and securities for money, goods, and chattels, and all other his personal estate and effects whatsoever and wheresoever, (after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies thereinbefore bequeathed), he gave and bequeathed unto his said daughter, to be assigned, transferred, and paid to her at her age of twenty-one years or day of marriage, with a gift over in the event of her dying under that age and unmarried.

By the order made on the hearing of the cause for further directions before the Lord Chief Baron, it was declared that the proceeds of the testator's real estates, which had been sold under the decree, were legal assets, and they were ordered to be applied accordingly. (a)

(a) See 4 *Y. & Coll.* 509.

first, of an intention to charge the real estate in aid of the personalty

A testator began his will by directing that all his just debts, funeral and testamentary expenses, should be fully paid and satisfied. He then devised all his real estate to his daughter and her issue in strict settlement; and after giving one specific and one pecuniary legacy, he gave all the residue of his personal estate (after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies before bequeathed) to his said daughter. Held, reversing the judgment below, that the concluding clause of the will was not sufficient to rebut the presumption, arising from the

The

with the debts.

1841.

PRICE
v.
NORTH.

The administrators, with the will annexed, of the testator, on behalf of the simple contract creditors, appealed from that order to the Lord Chancellor, under the 5 *Vict. c. 5. s. 22.*, and the appeal now came on to be heard.

Mr. *Swanston* and Mr. *Coleridge*, in support of the order below, relied on *Douce v. Lady Torrington* (a) and *Palmer v. Graves* (b); and contended, upon the authority of those cases, that the presumption, arising from the first clause of the will, of an intention on the part of the testator to charge his real estate with his debts, was rebutted by the words "after and subject to the payment &c.," in the subsequent clause; inasmuch as those words could otherwise have no operation or meaning at all. They also adverted to the circumstance, that the real estates were devised in strict settlement, as strengthening that construction.

Mr. *Girdlestone* and Mr. *Neate*, for the Appellants, cited *Clifford v. Lewis* (c) and *Graves v. Graves*. (d)

Mr. *Coleridge*, in reply.

Dec. 20. The LORD CHANCELLOR, after stating shortly the material substance of the will, said :

The question is, whether this will constitutes a charge upon the testator's real estate, for the payment of his debts. Now, the first direction in the will clearly amounts to a charge: that is admitted; but it is only a charge by implication, and may therefore be rebutted, provided there be any thing to be found in other parts
of

(a) 2 *M. & K.* 600.

(b) 1 *Keen*, 545.

(c) 6 *Mad.* 53.

(d) 8 *Sim.* 43.

of the will inconsistent with the supposition that such was the testator's intention. Thus, in *Thomas v. Britnell* (a) the testator first ordered all his debts and funeral charges to be honourably paid after his decease; but in a subsequent clause he devised all his real estate, with a certain exception, to trustees, in trust for the payment of his debts, funeral expenses, and legacies, at the same time directing, that the excepted estates should be applied first to payment of the legacies. That specific appropriation of a part only of his estates to the payment of debts, was clearly inconsistent with an intention to charge the estates generally. So, in *Douce v. Lady Torrington*, the will commenced with a similar clause: but, by the codicil, the rents and profits of the testator's real estate were charged with the payment of 200*l.* a year to his son, and the residue only was to be applied to the discharge of the testator's simple contract debts. That was also clearly inconsistent with a general charge of debts on the real estate, and so it was accordingly held. The case of *Palmer v. Graves* perhaps goes further; but that decision was professedly founded on the two last mentioned cases, and cannot therefore be considered as laying down any new principle.

1841.
PRICE
v.
NORTH.

Now, what is here relied on for repelling the implication? It is the last clause. But when the testator bequeaths his personal estate, "after and subject to the payment of his debts," he does nothing inconsistent with an intention to charge his real estate with them also as an auxiliary fund; and, therefore, such a direction cannot control the operation of the general charge. Courts of equity have always been desirous of sustaining such charges for the benefit of creditors, and the presumption in favour of them is not to be repelled by any thing.

(a) 2 Ves. sen. 315.

1841.



PRICE

v.

NORTH.

thing short of clear and manifest evidence of a contrary intention.

The decree therefore must be varied, by declaring that the real estates are equitable assets instead of legal.



Nov. 22.
Dec. 6.

RUNDELL v. Lord RIVERS.

Practice in the
Master's office
in the proof of
bond debts,
under a decree
in a creditor's
suit.

THIS was a creditor's suit, in which a question arose, upon exceptions to the Master's report, as to the proper form of the affidavit to be made by a bond creditor in proving his debt under the decree.

The estate under administration being insolvent, the claim in question had been opposed before the Master, on a suggestion that the consideration for which the bond had been given was illegal; and some evidence had been adduced in support of that suggestion. The Master, however, had allowed the claim, upon proof of the due execution of the bond, and an affidavit, by the obligee, simply stating that such and such a sum was due upon it for principal and interest.

The ground of one of the exceptions was, that that affidavit was insufficient, in not further stating whether any and what consideration had been given for the bond. And in support of the exception it was argued, that the form of the affidavit which the Master had admitted was applicable only to cases in which the debt was not disputed on behalf of other creditors; *Fladong v. Winter*

ter (a); and that where it was so disputed, the form of the affidavit ought to be the same as in bankruptcy, where the party tendering a proof was in all cases required to state the consideration upon which his debt had arisen, whether it was founded upon a specialty or upon simple contract. (*b*)

1841.

 RUNDELL
 v.
 Lord RIVERS.

On the other hand, it was insisted that, whatever might be the form of the affidavit required in bankruptcy, the affidavit in question was framed in conformity with the ordinary practice in the Master's office; and that, to justify a departure from that practice, it was not enough that the debt was disputed, but it must appear to be disputed upon substantial grounds, which, in the opinion of the Master, was not the case here.

The Lord Chancellor, before giving judgment, sent the following question to the Masters, respecting the practice in their offices.

“Whether, in the administration of assets, where a charge is brought in for a bond debt, it is the practice in the Master's office to require that the affidavit of debt should state the consideration for which the bond was given, as in the case of simple contract debts?”

In answer to which the following certificate was returned, signed by eight Masters.

“We, the undersigned Masters, in obedience to your Lordship's request, do certify in reply to the question submitted to us,

That

(*a*) 19 Ves. 196.

(*b*) See *Archbold's B. L.* B. ii. p. 40.

1841.

 RUNDELL
 v.
 Lord RIVERS.

“That it is not the practice in our offices to require that the affidavit of debt should state the consideration for which the bond was given, as in the case of simple contract debts; and that it is sufficient that the affidavit do state that the deceased was indebted in so much money upon the bond.

“And we beg leave further to state to your Lordship, that if a bond be not twenty years old, we require the execution of it to be proved in the regular way, and that, when a case of suspicion is raised as to the consideration, we then inquire into the validity of the bond.”

Dec. 6.

The LORD CHANCELLOR in giving judgment on a subsequent day, after stating the substance of the certificate, adopted the rule of practice as therein laid down, and said, that the only question, therefore, which remained to be considered, was, whether, upon the evidence which had been adduced before the Master, the present case was one of such suspicion as to have made it incumbent upon him, according to that rule, to inquire into the consideration for which the bond had been given; and being of opinion, upon a review of the evidence, that such a case had been made out, his Lordship referred it back to the Master to review his report, but at the same time declined to give any directions as to whether a further affidavit only should be required, or whether any of the other modes of investigation pointed out by the 72d order of *April* 1828 (*a*) should

(*a*) That the Master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *vide voce*, or in both modes, as the nature of the case may appear

to him to require; the evidence on such examination being taken down at the time by the Master, or by the Master's clerk in his presence, and preserved, in order that the same may be used by the Court if necessary.

should be resorted to, observing that that was a matter upon which the Master was to exercise his discretion when the case should again be brought before him.

1841.

 RUNDELL
 v.
 Lord RIVERS.

Mr. *Tinney* and Mr. *Toller* appeared in support of the exceptions.

Mr. *Turner* and Mr. *Wigram*, *contra*.

HERRING v. CLOBERY.

1842.
 Feb. 11, 12.

BY a memorandum of agreement, dated the 7th of *February* 1826, and made between *Elizabeth Herring*, widow, of the one part, and *John Herring Clobery*, her eldest son, of the other part, it was agreed that in consideration of a certain sum of money to be paid by *J. H. Clobery* to or on account of *Elizabeth Herring*, the family estates, of which *Elizabeth Herring* was then tenant for life, with remainder to *J. H. Clobery*, as to part, in tail, and as to the rest, in fee, should be resettled to the use of *J. H. Clobery* for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail, with certain remainders over to the younger son and only daughter of *Elizabeth Herring* and their respective children. A recovery was accordingly suffered; but the deed by which the uses of the recovery were declared, and which bore date the 11th of *April* 1826, varied in several particulars from the terms of the agreement as contained in the memorandum. In the year 1837, the bill in this cause was filed by *Elizabeth Herring* and her younger son and his only daughter, whose interests under the memorandum

Where an attorney is employed by a client professionally, to transact professional business, all the communications which pass between them in the course, and for the purpose of that business, and not those only which relate to litigation commenced or in contemplation, are privileged communications.

were

1842.

HERRING

v.

CLOBERY.

were prejudiced by the variations, against *J. H. Clobery* and other parties; alleging that *Elizabeth Herring* had executed the deed under the impression that it was framed in conformity with the terms of the memorandum, and that the Plaintiffs had only recently discovered the contrary, and praying, therefore, that the deed might be rectified, and made conformable to the agreement as contained in the memorandum.

The defence set up to the bill was, that the terms of the agreement had been altered previously to the execution of the deed, with the knowledge and consent of both the contracting parties; and that the deed, as it stood, was in conformity with the agreement as so altered.

Amongst other witnesses examined by the Defendants, was one *Thomas Pearse*, who had acted as the solicitor of *Elizabeth Herring* in the transactions connected with the resettlement of the estates, but who had, very shortly after the execution of the deed of *April 1837*, ceased to be employed by her, and had never acted for her since. His evidence went to prove that she was not only privy to, but had herself suggested the variations in the agreement; and that she had executed the deed with deliberation, and with full knowledge of its contents.

By the decree made on the hearing of the cause before the Vice-Chancellor of *England*, the bill was dismissed with costs.

At the rehearing of the cause before the Lord Chancellor, *Elizabeth Herring* being dead, an objection was taken on the part of the surviving Plaintiffs to the reception of a great part of *Pearse's* evidence, on the ground

ground of its being a disclosure of communications made to him by *Elizabeth Herring* in the course of his employment as her solicitor, or of acts done by her at interviews between them at which he had been present in that character.

1842.
HERRING
v.
CLOBERY.

Mr. *Tinney*, Mr. *Wakefield*, and Mr. *Romilly*, argued for the Plaintiffs in support of the objection, and cited the following cases: — *Cromack v. Heathcote* (a), *Harvey v. Clayton* (b), *Walker v. Wildman* (c), *Cholmondeley v. Clinton* (d), *Greenough v. Gaskell* (e), *Sawyer v. Birchmore* (g), *Desborough v. Rawlins*. (h)

Mr. *Richards*, and Mr. *Wright*, for the Defendant *J. H. Clobery*, *contra*, cited the following cases: — *Wadsworth v. Hamshaw* (i), *Williams v. Mundie* (k), *Broad v. Pitt* (l), *Bramwell v. Lucas* (m), *Clark v. Clark* (n), *Bolton v. The Corporation of Liverpool*. (o)

Mr. *Bethell*, Mr. *Reynolds*, and Mr. *Hare*, appeared for other Defendants.

The LORD CHANCELLOR.

Feb. 12.

I have considered the authorities that were cited the other day, and the arguments that were urged with reference to the evidence of Mr. *Pearse*, and I am of opinion that the principle acted upon in the case of *Cromack v. Heathcote* (p), which was cited at the bar, is the correct principle; namely, that where an attorney is

(a) 2 *Brod. & Bing.* 4.

(b) 2 *Swanst.* 221. n.

(c) 6 *Madd.* 47.

(d) 19 *Ves.* 261.

(e) 1 *M. & K.* 98.

(g) 3 *M. & K.* 572.

(h) 3 *Myl. & Cr.* 515.

(i) 2 *Brod. & Bing.* 5. n.

(k) 1 *Car. & P.* 158.

(l) 1 *Mood. & Mal.* 237.

(m) 2 *B. & C.* 745.

(n) 1 *Mood. & Rob.* 3.

(o) 1 *M. & K.* 88.

(p) 2 *Brod. & Bing.* 4.

1842.

HERRING
v.
CLOBERY.

is professionally employed by a client, any communications which pass between them for the purpose of that employment are privileged communications. I think that that decision of the Court of Common Pleas is in conformity with the previous decisions, and with the general understanding of the profession.

Several *Nisi Prius* decisions before Lord *Tenterden* were indeed cited, in which that very eminent judge laid down a narrower principle of protection. It was, at first, I think, stated that he had limited the protection to cases where the communications took place either in the progress of a cause, or in a cause which was about to be instituted (*a*); and that he afterwards extended it further, namely, to cases where doubts and controversies existed (*b*); and it appears also, that in one *Nisi Prius* case (*c*), Chief Justice *Best*, now Lord *Wynford*, was inclined to adopt the opinion of Lord *Tenterden*. I think, however, that the principle so laid down is not supported by any previous authority, and that it is moreover inconsistent with, or rather I should say, not founded upon sound principle. When I say it is not supported by any previous authority, I do not lose sight of that case to which Lord *Tenterden* referred (*d*), namely, the case of bribery which occurred on the Midland circuit; but the circumstances of that case are not stated with any precision or accuracy, and I think it is possible, looking at the nature of it, and probable, that the decision proceeded upon another ground. But further, I think that restriction of the rule is not consistent with, and not founded on, any sound

(*a*) *Williams v. Mundie*, *ubi sup.*

(*b*) *Clark v. Clark*, *ubi sup.*

(*c*) *Broad v. Pitt*, *ubi sup.*

(*d*) Cited in *Clark v. Clark*,
1 *Mood. & Rob.* 5.

sound principle; for it may, and in a great variety of cases would, be of as much importance to parties that the communications made between a client and a solicitor with respect to the state of the client's property, with respect to his liabilities, with respect to his title, should be protected, as that protection should be afforded to communications made in the progress of a cause; and it appears to me that, as individuals must from time to time resort to their legal advisers for guidance in their ordinary transactions, public policy requires that communications of that kind should be privileged and protected, in order that they may be free and unfettered.

1842.

 HERRING
 v.
 CLOBERY.

If, therefore, the cases stood here, I should be inclined to adhere to the decision of the Court of Common Pleas, in preference to adopting that which I consider to be a new rule laid down by Lord *Tenterden*. In fact, however, the cases do not rest here. A case which came before this Court in the time of Lord *Brougham* (a), was very elaborately discussed at the bar, and it was considered very much in detail by the Lord Chancellor: he delivered a very elaborate judgment upon the subject, and that judgment supports the decision of the Court of Common Pleas. But still further, the question came before this Court again (b) during the time of my immediate predecessor, Lord *Cottenham*; and though he was not called upon, from the particular circumstances of the case, to pronounce any decision upon the general question, yet it is quite clear, from the scope of his observations and the line of argument that he pursued, that he was inclined to adopt the principle laid down by the Court of Common Pleas.

I there-

(a) *Greenough v. Gaskell*, 1
M. & K. 98.

(b) *Desborough v. Rawlins*, 3
Myt. & Cr. 515.

1842.

HERRING
v.
CLOBERY.

I therefore entertain no doubt as to the principle upon which I ought to act in this case with respect to Mr. *Pearse*, and I lay down this rule with reference to this cause, that where an attorney is employed by a client professionally, to transact professional business, all the communications that pass between the client and the attorney in the course, and for the purpose, of that business, are privileged communications; and that the privilege is the privilege of the client, and not of the attorney. It is easy to apply this to the evidence of Mr. *Pearse*, as it is read in detail. There will be no difficulty, therefore, in saying what part of the evidence is to be admitted, and what part is to be excluded. (a)

(a) See the next case.

June 27.
July 6.

JONES v. PUGH.

R., a solicitor, having taken a mortgage upon the property of *P.* in his own name, but really on behalf of certain clients, by whom he had been confidentially employed to procure investments for their money,

THIS was an appeal from an order of the Vice-Chancellor of *England*, by which he had held the answer of the Defendant *Richard Roy* to the amended bill to be insufficient.

The Plaintiff was a judgment creditor of the Defendant *Pugh*, and the bill, as originally framed, after stating that the Plaintiff had caused his judgment to be duly docketed according to the statute, and that he had

sued

and having also been employed at different times in effecting mortgages upon parts of the same property for other clients who had taken the securities in their own names: Held, on a bill being filed against *R.* and *P.* by a judgment creditor of the latter, to redeem the mortgaged premises, that *R.* was not bound to disclose the names either of the *cestuis que trust* of the mortgage to himself, or of the parties by whom he had been employed in the other mortgages.

sued out an *elegit* upon it, alleged that some time in the month of *October* 1834, *Pugh* had executed an indenture by which he had conveyed and assigned all his real and personal estate to *Roy*, upon trust to sell and apply the proceeds in payment of certain debts of *Pugh's*, including the debt for which the Plaintiff's judgment had been recovered; and that *Roy* had since sold the premises comprised in the indenture, and had then in his hands a sum of money arising from the sale, which the bill prayed might be applied in satisfaction of the Plaintiff's judgment.

1842.

JONES
v.
PUGH.

The Defendant *Roy*, who was a solicitor carrying on business in partnership with several other persons, in his answer to that bill, denied that *Pugh* had executed to him any such indenture as was alleged in the bill, or any other indenture for the benefit of his creditors generally; but he admitted that *Pugh* did, in or about the year 1834, execute several mortgages to several clients of the Defendant and his partners, and that as to one of such mortgages, which was dated the 29th of *October* 1834, and made for securing the sum of 20,000*l.* to certain clients of the Defendant and his partners, who had, through the medium of the Defendant, advanced that sum to *Pugh*, he the Defendant was appointed a trustee therein for such mortgagees: that he was not in any way interested or concerned in any of the other mortgages before mentioned, and that he was unable to set forth any of the particulars of such mortgages, or of the parcels or property comprised in them, without having recourse to documents which he and his partners held as solicitors for the several parties interested therein; and that he could not disclose any of such particulars without a violation of professional confidence.

Upon that answer being put in, the Plaintiff amended his bill by stating the conveyance to *Roy* as a mortgage,

VOL. I.

H

and

1842.

JONES

v.

PUGH.

and praying that he might be let in to redeem it; with a view to which relief, the amended bill, after suggesting that it was alleged that the legal estate in the mortgaged premises was not vested in *Roy* under the mortgage of *October* 1834, and, moreover, that the Plaintiff was not the person entitled to redeem that mortgage, charged, amongst other things, that the Defendant ought to answer and set forth who had been and were the persons beneficially interested under the indenture of *October* 1834, and whether prior and subsequently thereto, any and what mortgage or mortgages, or other and what security or securities had been made, and when, and by whom, and to whom, upon all or any, and what part of the said real and personal estates of *Pugh*, and for what sum or sums of money respectively; and who had been or were the persons interested in such mortgages or securities respectively. These questions were also incorporated, by reference, into the interrogating part of the bill.

The Defendant *Roy*, in his answer to the amended bill, set forth the substance of the indenture of *October* 1834, which purported, '(according to his statement), to be made between *Pugh* of the one part, and *Roy* of the other part, and to create a charge upon certain real and personal property of *Pugh*, (the particulars of which were also set forth in schedules to the answer), by way of security for the sum of 20,000*l.*, therein recited to have been advanced by *Roy* to *Pugh*. He then averred that the money was by the said indenture made payable to himself, and that no trust was therein declared or referred to for the benefit of any other person, and that he was authorized by his clients, and was entitled, to receive payment of the mortgage money and interest, and, upon receipt thereof, to give a good discharge for the same and to transfer the security. He

further

further stated that the said indenture was then in the custody of himself and his partners as solicitors for the parties beneficially interested therein : and he added, that it was a frequent practice of the firm to which he belonged, to lay out monies, intrusted to them by their clients for investment, in his the Defendant's own name, under a private trust and confidence between himself and the clients, that their names should not be disclosed. Under these circumstances, he submitted that he was not bound to set forth who were the persons beneficially entitled under the indenture of *October 1834*. With respect to the other questions above mentioned, he denied that the legal estate in any lands, tenements, or hereditaments belonging to *Pugh* was then or ever had been vested in him, or that either prior or subsequent to the mortgage of *October 1834*, any mortgage or other security had been made to him, of or upon all or any part of the real or personal estate of *Pugh* ; and he added that he had no knowledge or information respecting any of such prior or subsequent mortgages as were alleged by the bill, except what he had acquired in his character of solicitor for the mortgagees, and which, for the reasons mentioned in his former answer, he submitted that he ought not to disclose.

1842.
JONES
v.
PUGH.

To that part of the answer the Plaintiff took several exceptions for insufficiency : the first, applying to that part of the enquiry which related to the mortgage of *October 1834* ; and the other two, to those parts which related respectively to mortgages prior and subsequent to that security. All the three exceptions were allowed by the Master, and exceptions taken by the Defendant to the Master's report, were overruled by an order of the Vice-Chancellor, which was the subject of the present appeal.

1842.

JONES
v.
PUGH.

The appeal now came on to be heard.

Mr. *Bethell* and Mr. *Cole*, for the appellant.

The ground on which the Vice-Chancellor overruled the exceptions was, that, even supposing the professional privilege to extend to a case of this kind, which his Honor was inclined to think that it did, a Defendant could only avail himself of it by plea, and that as the Defendant in this instance had submitted to answer, he was bound to answer fully. The general rule, however, to which his Honor referred, is subject to several exceptions, and the present is one of the excepted cases: *Wigram's Points in the Law of Discovery* (a), *Redesd. Plead.* (b), *Stratford v. Hogan.* (c) As to the extent of the privilege in question, it is now settled that it is not confined to communications which pass between attorney and client with reference to litigation; but that it protects all communications made by a client to an attorney in his professional character: *Desborough v. Rawlins* (d), *Herring v. Cloberry* (e), *Doe v. Watkins* (g).

Mr. *Richards* and Mr. *Wigram*, *contra*.

Independently of the technical ground upon which the case was disposed of by the Court below, there are other and more substantial grounds upon which the order may be sustained. Those grounds are, first, that the information, which the Defendant refuses to give, is, in its nature, not a proper subject of professional privilege, inasmuch as it consists of matters of fact, and not of confidential communications made to the solicitor

(a) Pp. 60. 194.

(b) P. 307. 4th edition.

(c) 2 *Ball. & Bea.* 164.

(d) 3 *Myl. & Cr.* 515.

(e) *Suprà*, p. 91.

(g) 3 *Bing. N. C.* 421.

solicitor for the purpose of obtaining legal advice : *Bramwell v. Lucas* (a), *Sawyer v. Birchmore* (b) : secondly, it has been laid down by Lord *Eldon*, that a witness demurring on the ground that his answer would violate the confidence reposed in him as attorney, must state the name of his client ; *Parkhurst v. Lowten* (c) ; and the same rule, of course, applies to a Defendant. It is true that in *Harvey v. Clayton* (d), a similar objection was taken by way of plea, without stating the names of the clients, and Lord *Nottingham* allowed the plea ; but that case is of little value as an authority, for it extended the privilege to a mere scrivener, which certainly would not be allowed at the present day ; and at all events, as regards the point now in question, it must be considered to have been overruled by the later doctrine laid down by Lord *Eldon*.

1842.
JONES
v.
PUGH.

These observations apply to all the exceptions : with respect, however, to that part of the discovery which relates to the indenture of *October* 1834, the case is still stronger : for, with reference to that instrument, the Defendant has assumed the character of trustee, and it is not competent to him to withhold information which he possesses in that character, merely because he happens to possess it also in the character of solicitor ; *Guppy v. Few*. (e) That, in taking the security in his own name, he acted as a solicitor, cannot be pretended ; for it was what any unprofessional agent might have done just as well :

- (a) 2 *B. & C.* 745.
(b) 3 *M. & K.* 572. ; see also *Desborough v. Rawlins*, *ubi sup.* p. 521.
(c) 2 *Swanst.* 194., see pp. 201. 203.
(d) *Ibid.* 221. n.
(e) *Hare's Treat. on Disco-*

very, pp. 124. 168. See also 1 *Myl. & Cr.* 487. The case was cursorily mentioned as bearing upon this part of the argument, but the circumstances of it were not fully stated to the Court, nor was its authority much insisted upon.

1842:

JONES

v.

PUGH.

well: and as no injunction of secrecy would excuse an ordinary agent from the obligation of disclosing the names of his *cestuis que* trust, so neither can a solicitor, who happens to be employed for such a purpose, be excused on the ground of professional confidence. Should such an exception be allowed, the consequence in the present case will be, that the Plaintiff will have no means of bringing the parties beneficially interested under the mortgage of *October* 1834, before the Court; and no decree which he may obtain in their absence will be binding upon them; *Osbourn v. Fallows.* (a)

Mr. *Bethell* in reply.

It is clear, from the answer, that the Defendant acted throughout in the character of solicitor, and in that character he is protected from answering: with respect, moreover, to the mortgage of *October* 1834, *Harvey v. Clayton* is directly in point; and there is no ground for impugning its authority, which has been lately recognised by Lord *Brougham* in *Greenough v. Gaskell.* (b) Independently, however, of privilege, the Defendant is under no obligation to disclose the names of his *cestuis que* trust; because the answer, which, for the present purpose, must be taken to be true, expressly states that the Defendant is authorised to give a discharge for the mortgage money, and if so, the *cestuis que* trust are not necessary parties to the suit, and, consequently, the discovery of their names is immaterial.

The Lord Chancellor, in the course of the argument, observed, that it was an ordinary part of a solicitor's duty to lay out money for his clients; and that if the discovery in question could not be given without a breach of

(a) 1 R. & M. 741.

(b) 1 M. & K. 98.

of professional confidence, no inconvenience which the Plaintiff might be put to by the want of it, could be a reason for compelling the Defendant to give it.

1842.

JONES
v.
PUGH.

At the conclusion of the argument, his Lordship said he was of opinion, upon the authority of *Harvey v. Clayton* (a), that the Defendant could not be compelled to state the names of his clients. The case in question stood on stronger grounds than those in which the protection was given for the sake of the party himself: here the privilege being that of the client, the Defendant had no right to answer the questions.

As to the form in which the objection had been taken, his Lordship said he thought it was competent to the Defendant to take it by answer; and that, if it had been called to the attention of the Vice-Chancellor, that there were several exceptions to the rule that a Defendant who answers at all must answer fully, and that the present case formed one of those exceptions, his Honor would probably have come to a different conclusion.

The Vice-Chancellor's order was accordingly reversed, and the exceptions to the report allowed.

(a) 2 *Swanst.* 221. n.

STANLEY v. BOND.

Feb. 16.

THE Defendant in this case, entered an appearance on the 24th of *January* 1842. On the 1st of *February* following, the Plaintiff obtained, as of course, an injunction. Under the 10th Order of *December* 1833, the common injunction cannot be obtained until the ninth day after the day of the Defendant's appearance.

1842.

STANLEY
v.
BOND.

an order for the common injunction. The Defendant then moved before the Master of the Rolls to discharge that order for irregularity; which motion, having been refused by his lordship, was now renewed by way of appeal before the Lord Chancellor.

Mr. *Richards* and Mr. *Toller*, in support of the motion, contended that, in computing the eight days allowed to a Defendant by the 10th Order of *December* 1833 before the common injunction could be obtained, the day of appearance was to be excluded; and, therefore, even admitting that the day of putting in the plea &c. was to be included in the eight days, the Defendant in this case had the whole of the 1st of *February*, being the eighth day after the day of appearance, for that purpose; and that the 2d of *February*, being the ninth day, was the earliest period at which the common injunction could be obtained. They cited *Lester v. Garland* (a), *Mootham v. Waskett* (b), *Manners v. Bryan* (c), *Angell v. Wescombe*. (d)

Mr. *Wigram* and Mr. *Wright*, *contra*.

The LORD CHANCELLOR.

It is important that there should be a uniform rule of construction, and I am disposed to adopt the rule laid down by Lord *Cottenham* (e), that one day is to be included, and the other excluded.

Order discharged.

(a) 15 *Ves.* 248.

(b) 1 *Mer.* 243.

(c) 1 *Myl. & K.* 453.

(d) 1 *Myl. & Cr.* 48.

(e) *Ibid.* p. 50.

1842.

In the Matter of THOMAS and WILLIAM STYAN, *Feb. 16. 26.*
Bankrupts.

THIS was an appeal, in the form of a special case, from the Court of Review.

The material facts, as stated in the case, were, that the bankrupts being indebted to *William Henry Smith* and others, as executors of one *Sarah Styan*, in the sum of 3800*l.*, executed to them a bond, dated the 20th of *August* 1838, for the payment of this debt, and also deposited with them, as a collateral security, a policy of assurance for 2500*l.*, which had been effected upon the life of the bankrupt *Thomas Styan*, in the office of the *Equitable Assurance* Company; that company being a joint stock concern, in which the assured were jointly interested as co-partners in the profits. Notice of this deposit was given to the office on the 22d of *March* 1841, previously to which time, however, namely, on the 15th of *March*, *Thomas Styan* had committed an act of bankruptcy. The fiat was issued on the 1st of *April* following; and there being then a sum of 3782*l.* remaining due upon the bond, the obligees presented a petition to the Court of Review, praying that the policy might be sold, and the proceeds applied in liquidation of their debt; and an order was made accordingly, on the ground, as it was stated in the case, that there was no sufficient proof before the Court that the policy was, at the time of the bankruptcy, within the order and disposition, and in the reputed ownership, of the bankrupt, within the meaning of the statute 6 G. 4. c. 16. s. 72.

A deposit of a policy of assurance by way of security for a debt, made previously to the commission of an act of bankruptcy by the depositor, and notified to the insurance company, by the party with whom the deposit was made, previously to the issuing of the fiat, though subsequently to the act of bankruptcy: Held, valid as against the assignees under the 2 & 3 Vict. c. 29., it not appearing that, at the time the notice was given to the company, the party giving it was aware of an act of bankruptcy having been committed.

The

1842.

In re
STYAN.

The special case now coming on to be argued,

Mr. *Richards* and Mr. *Stinton*, for the assignees, in support of the appeal, said, it was now too late to contend that notice to the assurance office of a deposit and pledge of a policy was not necessary to take it out of the order and disposition of the depositor, in the event of his afterwards becoming bankrupt; *Ryan v. Rowles* (a), *Jones v. Gibbon* (b), *Ex parte Monro* (c), *Ex parte Burton* (d), *Ex parte Usborne* (e), *Williams v. Thorp* (g), *Ex parte Colville* (h), *Ex parte Tennyson* (i): and that the only question in this case was, whether any valid and effectual notice of the deposit had been given. Now the only notice that had been given, was given after the act of bankruptcy had been committed, at which time all beneficial interest in the policy must be considered as having passed to the assignees. It would be argued, however, that inasmuch as the depositor was by the constitution of the company a partner in it, the company must be taken to have had constructive notice, through him, of the deposit, before the act of bankruptcy was committed; but that point had been adverted to in *Williams v. Thorp* (k), and had been disregarded by the Court.

In addition to the authorities above-mentioned, the following cases were also cited; *Dearle v. Hall* (l), *Loveridge v. Cooper* (m), *Smith v. Smith* (n), and *Meux v. Bell* (o).

Mr.

(a) 1 *Ves. sen.* 348.; see p. 367.
S. C. 1 *Atk.* 165.; see p. 177.

(b) 9 *Ves.* 410.

(c) *Buck*, 300.

(d) 1 *Gl. & Jam.* 207.

(e) *Ibid.*, 358.

(g) 2 *Sim.* 257.

(h) *Mont.* 110. *S. C.* 2 *Sim.* 570.

(i) *Mont. & Bl.* 67.

(k) *ubi sup.* pp, 260, 261.

(l) 3 *Russ.* 1.

(m) *Ibid.*

(n) 2 *Cr. & Mee.* 231.

(o) 1 *Hare*, 73.

Mr. *Swanston* and Mr. *Bacon*, *contra*, referred to the cases of *Falconer v. Case* (a), and *Bozon v. Bolland* (b), as throwing some doubt upon the position, that notice of the assignment or deposit of a policy was necessary, to take it out of the order and disposition of the assignee or depositor. But even supposing that such notice was necessary, they contended that *Duncan v. Chamberlayne* (c) was an express authority for the proposition, that in a company constituted as this was, the privity of one of its members to an assignment, was notice to the company; and the decision in *Ex parte Waithman* (d) could only be supported upon the same principle. But, lastly, they contended, that at all events the express notice which had been given in this case before the issuing of the fiat, although subsequently to the act of bankruptcy, was made effectual by the stat. 2 & 3 *Vict. c. 29.* which gave validity to all *bona fide* proceedings and transactions by or with a bankrupt previous to the issuing of the fiat, notwithstanding a prior act of bankruptcy might have been committed, provided the party dealing with the bankrupt had at the time no notice of such act of bankruptcy; and there was no suggestion of such notice having existed here. If it should be objected that the notice given to the insurance office was not a dealing with the bankrupt within the meaning of the act, the answer was, that the only object of that notice was to complete the party's title under the deposit; and as the deposit was clearly a dealing with the bankrupt, the giving of the notice, which was a part of the same transaction, must be considered as partaking of the same character.

1842.

In re
STYAN.

Mr.

(a) 1 *Bro. C. C.* 125. *S. C.* cited
2 *T. R.* 491.

(b) Cited *Mont. & Bl.* 74.

(c) 11 *Sim.* 123.; see p. 126.

(d) 4 *Dea. & Ch.* 412., see
however *Ex parte Burbridge*,
1 *Dea.* 131. 142.

1842.


In re
STYAN.

Mr. *Richards*, in reply, contended that the stat. 2 & 3 *Vict. c. 29.* had no application to this case, and he added that the Court below had expressed a decided opinion to the same effect.

The LORD CHANCELLOR, towards the conclusion of the argument, observed, that if the question turned upon the necessity of notice to the insurance office in order to take the policy out of the order and disposition of the bankrupt, he should feel it difficult, after the concurrence of authorities which had been cited upon that point, to decide against the appellants.

Feb. 26.

The LORD CHANCELLOR now delivered judgment.

The bankrupts in this case executed their bond in *August* 1838 to the petitioners, as executors of *Sarah Styan* for a sum of 3800*l.* in respect of a debt due from them to her estate; and as a collateral security for the payment of the debt, deposited with them a policy of insurance for 2500*l.* on the life of one of the bankrupts. At the date of the fiat there was due to the petitioners, as executors, the sum of 3782*l.* on account of the bond. *Thomas Styan* committed an act of bankruptcy on the 15th of *March* last, and on the 22d of *March* notice was given to the assurers of the pledge and deposit of the policy. The fiat was issued on the 1st *April*.

Upon these facts it was contended on the part of the assignees, that the policy passed to them under the fiat, inasmuch as no notice was given to the assurers of the deposit before the act of bankruptcy. On the other hand, it was contended on the part of the executors, first, that no notice was in this case necessary, and secondly, that, even supposing a notice was required, the assured was a partner in the insurance company, which

which was in the nature of a joint stock company, and that notice to him, or rather his knowledge of the deposit which he had himself made, was, in point of law, notice to the company. It was further contended for the petitioners that they were entitled to retain the policy by virtue of the statute 2 & 3 *Vict. c. 29*.

1842.

In re
STYAN.

It is unnecessary to give any opinion with respect to the two first questions to which I have adverted, or to comment on the authorities which have been cited, because it appears to me, that the case falls distinctly within the provisions of the act to which I have referred. By that statute it is enacted that all contracts, dealings, and transactions, by and with any bankrupt really and *bonâ fide* entered into before the date and issuing of the fiat against him, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt had not at the time of such contract, dealing, or transaction, notice of any prior act of bankruptcy by him committed. All *bonâ fide* dealings and transactions, therefore, with the bankrupt before the fiat, and without notice of the act of bankruptcy, are valid. In this case the transaction or dealing consisted of the deposit or pledge of the policy, and of the notice to the assurers; which latter step, it is contended, was necessary to render the transaction binding against all other claimants. The whole of this was completed before the date of the fiat; and it is not alleged that the transaction was not in every part of it *bonâ fide*, or that the parties had any notice of the act of bankruptcy.

It appears to me, therefore, that the case falls distinctly within the statute, and that the transaction is protected by it. Supposing the pledge to have been made *bonâ fide*, and without notice of the act of bankruptcy,

1842.

In re
STYAN.

ruptcy, immediately after that act, and to have been followed by a notice given before the fiat, could it be doubted that such a transaction would fall within the provisions of the statute? And what difference can it make in this respect, that the deposit was, in the present instance, made long before the act of bankruptcy, and the transaction completed by a notice given after such act, but before the date of the fiat? It is sufficient that the whole transaction was *boná fide* and without notice of the act of bankruptcy, and that every part of it took place before the date of the fiat.

I am of opinion, therefore, that the order of the Court of Review must be affirmed.

April 19. 27.

PASCALL v. SCOTT.

An order made by the Vice Chancellor for the suppression of depositions, which had been taken in a cross cause, without leave of the Court, after publication had passed in the original cause, and which related principally,

but not exclusively, to matters in issue in the original cause, affirmed upon appeal; the parties, by whom the depositions had been taken, having, in the court below, declined a reference to the Master to distinguish what parts thereof related to matters not in issue in the original cause, and it being held that they were not entitled, under such circumstances, to have the objection to the evidence reserved to the hearing.

IN this suit there was an original cause, and a cross cause. Issue having been joined in the original cause, early in the year 1841, *Elizabeth Scott*, who was the sole Plaintiff in that cause, but only one of several Defendants in the cross cause, examined several witnesses, and publication, after having been several times enlarged, ultimately passed on the 20th of *December* in the same year. On the 2d of the same month, the Plaintiffs in the cross cause not having examined any witnesses in chief in either cause, although the cross cause was at issue

issue in the preceding month of *October*, *Elizabeth Scott* gave notice to their solicitor, that she should object to their going into evidence in their own cause, upon matters in issue in the original cause, after publication in that cause should have passed. In defiance, however, of that notice, and without the leave of the Court, the Plaintiffs in the cross cause proceeded to examine witnesses in that cause, subsequently to the 20th *December* ; whereupon a motion was made before the Vice-Chancellor of *England* on behalf of *Elizabeth Scott*, that certain of the depositions of those witnesses, which related principally, but not exclusively, to matters in issue in the original cause, might be suppressed, which was ordered accordingly.

1842.

 PASCALL
 v.
 SCOTT.

The Plaintiffs in the cross cause now moved, before the Lord Chancellor, to discharge that order.

In support of the appeal motion, it was stated at the bar, that the cross cause, besides being in the nature of a defence to the original cause, sought other independent relief, and that not only were several of the matters, to which the depositions applied, not in issue in the original cause, but that a part of these were matters which were not in dispute in the cross cause itself, as between the Plaintiffs in that cause and *Elizabeth Scott*, though material to the relief sought by them against the other Defendants ; and it was therefore insisted that not only was this not a case for the suppression of depositions at all, but that, even if such a course were, in strictness, admissible, the Court, in the exercise of its discretion, ought not to adopt it, but to reserve the objections to the evidence for consideration at the hearing, when the objectionable portion of it could easily be separated from the rest. At all events, it was contended that the terms of the Vice-Chancellor's order should have been
 restricted

1842.

PASCALL
v.
SCOTT.

restricted so as to take effect as between the Plaintiffs in the cross cause and *Elizabeth Scott* only; *Healey v. Jagger*. (a)

On the other side it was stated, and not disputed, that the Vice-Chancellor had offered the appellants a reference to the Master to inquire what part, if any, of the depositions complained of, related to matters not in issue in the original cause, but that the offer had been declined.

Besides the case above mentioned, the following authorities were cited in the course of the argument: — *Wilford v. Beaseley* (b), *Ward v. Eyles* (c), *Sawyer v. Bowyer* (d), *Purcell v. Macnamara* (e), *Smith v. Graham* (g), *Taylor v. Obee*. (h)

April 27.

The LORD CHANCELLOR, after stating the circumstances of the case, and observing that, if an irregularity had been committed, it had been upon full notice, proceeded as follows :

The rule unquestionably is, that witnesses cannot be examined in a cross cause upon matters in issue in the original cause, after publication in the latter cause has passed ; and this rule has been adhered to strictly, in order to guard against the danger of perjury. It is clear, therefore, that an irregularity has been committed, and the only question is, as to the proper mode of remedying it.

Now,

(a) 3 Sim. 494., see p. 498.

(b) 5 Atk. 501.

(c) Mos. 577.

(d) 1 Bro. C. C. 588.

(e) 17 Ves. 454.

(g) 2 Swanst. 264.

(h) 5 Price, 26.

Now, the natural and obvious course is, certainly, to move for the suppression of the depositions ; since, if improperly taken, they ought not to remain upon the files of the Court ; and this was accordingly the mode adopted in the case of *Sawyer v. Bowyer* (a) cited at the bar. It is true, that that case differs in one respect from the present, the application, there, being to suppress interrogatories for the examination of a witness before the Master ; but, upon the question as to the mode of correcting the irregularity, the difference does not appear to be material.

1842.
PASCALL
v.
SCOTT.

Several objections have, however, been taken to the adoption of this course in the present case, on the ground of inconvenience. First, it was said that the depositions embraced other matters besides those in issue in the original cause, and that on that account the objections to the evidence could be more conveniently dealt with at the hearing, when the Court, having the whole of the case before it, would have the means of distinguishing what parts of the evidence ought to be rejected ; but, as I am told that the parties have already had the option of a reference to the Master upon this point, and that they have declined it, that is an objection which cannot be entertained on the present occasion. It was then said that the cross cause was not merely in the nature of a defence to the original suit, but that it sought ulterior relief, and that possibly the original cause might be abandoned ; but the answer to that is, that if such a contingency should occur, it would be open to the Plaintiffs in the cross cause to apply to the Court for liberty to read, in that cause, the evidence taken in the original cause ; and if that evidence should be defective, it would be owing to their
own

(a) 1 Bro. C. C. 388.

1842.

PASCALL

v.

SCOTT.

own neglect. Lastly, it was said that there were other Defendants in the cross cause besides *Elizabeth Scott*, by whom alone the application for the suppression of the depositions had been made, and that the Plaintiffs ought to be allowed to read those depositions against such other parties. I am of opinion, however, that the depositions, having been irregularly taken, ought to be suppressed altogether, and that if any inconvenience should thence arise to the Plaintiffs in proceeding against any of the Defendants besides *Elizabeth Scott*, it should be made the subject of a special application.

Mr. *Teed* then submitted that, according to the Lord Chancellor's view of the case upon the last point, the Vice Chancellor's order ought to have been, expressly, without prejudice to such application as his Lordship had suggested; and he asked that the order might be varied accordingly, referring to the form of an order made in an analogous case by Lord *Eldon*; *Smith v. Graham.* (a)

The LORD CHANCELLOR, however, said, he thought the addition unnecessary, as the order would not, in its existing form, prevent any other application being made.

Motion refused with costs.

(a) 2 *Swanst.* 264.; see 265.

1842.

WALKER v. FLETCHER.

Jan. 27.


THE bill was filed under the stat. 53 G. 3. c. 159., by which the liability of shipowners, whose ship has run down or otherwise damaged another vessel, without any fault of theirs, is limited to the value of their ship and the freight it is earning at the time of the accident; the statute requiring, that to every bill filed by shipowners under its provisions, an affidavit should be annexed stating the amount of such value, and that such amount should be paid into Court.

Where an act of parliament required that to all bills which should be filed under its provisions an affidavit, of a certain form, should be annexed. Held, that it was no objection to an affidavit which had been annexed to a bill filed under the act, that it had been sworn three days before the bill was filed.

In this case the affidavit, which was intituled in the cause, appeared to have been sworn three days before the bill was filed; and upon a motion, now made, to discharge an injunction, which had been obtained upon payment of the sum, stated in that affidavit, into Court,

Mr. *Richards*, in support of the motion, argued that not only would such an affidavit not support an indictment for perjury, it having been sworn in a cause which did not at the time exist, but that, if the affidavits required in such cases were allowed to be sworn before the bills were filed, circumstances might come to the knowledge of the Plaintiff in the interval, which might affect his estimate of the value of the ship and freight, and, consequently, he might obtain the injunction upon payment of less than the sum which the act required.

The LORD CHANCELLOR, however, overruled the objection, observing, that when the legislature directed that the affidavit should be "annexed to the bill," it clearly intended that the filing of the bill and of the

1842.

 WALKER
 v.
 FLETCHER.

affidavit should be one act, which could not be unless the affidavit was sworn before-hand. As to the objection, that, if so sworn, it might not state the facts as they existed, or as the Defendant knew them to exist, at the time of the filing of the bill, his Lordship said, that if a party knowingly filed such an affidavit, he would not say whether he could be indicted for perjury upon it, but he might certainly be indicted for the fraud.

His Lordship afterwards stated, that, since the point had been raised, he had been informed that the Vice-Chancellor of *England* had lately enquired into the practice on bills of this kind, and that his Honor had ascertained from the clerks in Court, that the course adopted in this case, of swearing the affidavit before the day on which the bill was filed, had been the general practice ever since the act was passed, and that a similar practice had long existed with respect to bills of interpleader.

March 14.
 April 16.

CLARK v. CLARK.

A Defendant in custody under process of contempt for not appearing or not answering may be brought up, so as to satisfy the 5th Rule of 1 W. 4. c. 36. s. 14., during vacation, provided it be within the period pointed out by that rule for the purpose.

ON the 13th of *October* the Defendant was arrested under process of contempt for want of an answer, and on the 15th of the same month, being brought by *habeas corpus* before the Master of the Rolls, at his Lordship's private house, to answer his contempt, the usual order was made for turning him over to the *Flect.* He was not brought up again until some time in the month of *December* following, when an order was made for taking the bill *pro confesso* against him.

Mr.

Mr. *Richards* now moved for his discharge out of custody under the 5th Rule of 1 *W.* 4. c. 36. s. 14., contending that the bringing up of a prisoner, which that Rule required, was a bringing up to the bar of the Court in term time, and that a bringing up to the private house of the Judge during vacation went for nothing.

1842.

CLARK
v.
CLARK.

Mr. *Turner*, *contrà*, contended that it was the peremptory part only of the Rule which had reference to term time, and that the words, "if he shall not have been sooner brought to the bar of the Court," shewed that the Plaintiff had the option of bringing the prisoner up in an intervening vacation, if he thought fit.

The LORD CHANCELLOR said, he thought that that was the right construction of the Rule, as it was the most favourable to prisoners.

Motion refused.

The same point occurred, and received the same decision, a few days afterwards, in the case of *Needham v. Needham*.

May 7.

1842.

April 19.

MOSS v. BALDOCK.

MOSS v. LAKE.

The rule that there cannot be a second rehearing of a cause before the Lord Chancellor without a special order, applies equally whether the first rehearing is a reversal or an affirmation of the decree or order of the Court below.

THESE causes having been reheard upon the petition of the Plaintiffs by the late Lord Chancellor, who reversed the judgment of the Court below, the Plaintiffs presented a common petition of rehearing to the present Lord Chancellor; upon which an order was made, as of course, for setting down the causes to be again reheard.

A motion was now made on behalf of the Defendants, *John and William Lake*, that that order might be discharged, and that the petition of rehearing might be taken off the file for irregularity.


Mr. *Turner* and Mr. *S. P. White*, in support of the motion, contended that there could not be a second rehearing of a cause without special leave. *Fox v. Mackreth* (a), *East India Company v. Boddam* (b), *Waldo v. Caley* (c), *Deerhurst v. Duke of St. Alban's* (d), *Mousley v. Carr* (e), *Fournier v. Paine* (g), *Attorney-General v. Ward* (h), *Byfield v. Provis* (i), *Booth v. Creswicke*. (k)

Mr. *Parker* appeared for other Defendants in the same interest.

Mr.

(a) 2 *Cox*, 158.(b) 13 *Ves.* 421.(c) 16 *Ves.* 206., see p. 214.(d) 2 *Russ. & Myl.* 702.(e) 3 *Myl. & K.* 205.(g) *Ibid.* 207. n.(h) 1 *Myl. & Cr.* 449.(i) 3 *Myl. & Cr.* 437.(k) *Cr. & Ph.* 361.

Mr. *Wakefield*, *contra*, admitted that there had been an intimation of opinion by several judges against the allowance of a second rehearing, and that in *Mousley v. Carr* it had been said that a general order would be issued in conformity with that opinion, but he insisted that as no rule had in fact been promulgated upon the subject, the old practice, by which several rehearings were allowed, remained in force; *Marsh v. Hunter*. (a) That the present case was distinguishable from *Deerhurst v. Duke of St. Alban's* and most of the other cases referred to; inasmuch as in those cases the decisions on the first appeal were affirmances of those on the original hearing: and that, at all events, there was no precedent for the present application, the objection having in all former cases been taken upon the hearing of the petition.

1842.

 Moss
 v.
 BALDOCK.

The LORD CHANCELLOR.

I cannot help thinking that the rule has been sufficiently promulgated by the decisions in *Mousley v. Carr* (b) and *Byfield v. Provis* (c), and that the profession can hardly, after those decisions, be considered as taken by surprise. I think, therefore, that the petition of appeal is irregular, and must be taken off the file, and the order, which has been made upon it, discharged with costs.

(a) 3 *Mad.* 437. See p. 438.

(b) 3 *Myl. & Keen*, 205.

(c) 3 *Myl. & Cr.* 437.; see

p. 438.

1842.

June 25.

KERSHAW v. CLEGG.

The Court will allow a cause to be set down upon a Defendant's objection for want of parties, notwithstanding the fourteen days limited for that purpose by the 39th Order of *August* 1841 have expired, when the delay is satisfactorily accounted for.

MR. *ROMILLY*, on behalf of the Plaintiff, moved for leave to set down the cause for hearing, upon an objection taken by the answer for want of parties, notwithstanding the fourteen days limited for that purpose by the 39th Order of *August* 1841 had expired, stating that Vice-Chancellor *Knight Bruce*, before whom the motion had been made in the first instance, had doubted whether he had any discretion in the matter, and had desired that it might be mentioned to the Lord Chancellor.

The ground of the application was an affidavit by the Plaintiff's solicitor, stating that, although the answer appeared to have been filed on the 9th of *June*, he had, in consequence of the prolixity of the schedule, been unable to obtain an office copy until the 13th, one of the intervening days being *Sunday*; that on the 14th he had laid the answer before the counsel who drew the bill; but that, on the evening of the 13th, that gentleman had left town in consequence of the death of a near relation, and that he did not return until the 19th, after which he was prevented by the pressure of other business from advising upon the answer until the 22nd, when he advised that the cause should be set down for argument on the objection for want of parties.

Mr. *Romilly* suggested the analogy of those cases in which the Court was in the habit of extending the time for demurring, upon proper grounds for the indulgence being shewn.

The

The LORD CHANCELLOR, after reading the affidavit, said that he thought the delay was satisfactorily accounted for, and made the order.

1842.

KERSHAW

v.

CLEGG.

GILLBEE v. GILLBEE.

June 4.

A SUIT had been instituted on behalf of *James Gillbee* and others, infant children of *William Gillbee* deceased, against his widow and administratrix *Sarah Gillbee*, for the administration of his estate, and for the appointment of a guardian to the infants, and allowances for their maintenance. The usual accounts having been taken, and the residuary property of the intestate having been apportioned between the widow and the children, the shares of the latter were carried to their respective separate accounts, and by an order in the cause of the 3d of *March* 1814, *Sarah Gillbee* was appointed guardian of the infant *James Gillbee*, and the annual sum of 100*l.* was directed to be paid to her out of the income of his share of the property, for his maintenance during minority.

The property of a lunatic, not found such by inquiry, consisted of the sums of 4252*l.* Bank 3 per cent. annuities, and about 906*l.* cash, standing to his account in a cause to which he was a party, and some freehold property of the value of about 7*l.* per annum. A petition presented in the cause for the application of the income of the property to the maintenance of the lunatic, with a view to save the expense of a commission, was dismissed.

James Gillbee, at the time of attaining his age of twenty-one years, (which happened in *January* 1816,) was of unsound mind, and he afterwards remained in the same state. No commission of lunacy was, however, taken out, and *Sarah Gillbee* continued to receive the annuity of 100*l.*, directed to be paid to her by the order of the 3d of *March* 1814, and she maintained the lunatic thereout till her decease, which took place in *February* 1842. At that time the property of the lunatic consisted

1842.

GILLBEE

v.

GILLBEE.

consisted of the sums of 4252*l.* Bank 3 per cent. annuities, and 906*l.* 3*s.* 10*d.* cash, standing to his account in the cause, and a small freehold cottage and land stated to be of the value of about 7*l.* per annum. A petition was now presented in the name of the lunatic, praying that the income of that property might be paid to and received by his sister *Sarah Habershon* (who was his then sole next of kin), and her husband, to be applied by them for his maintenance, or that it might be referred to the Master to enquire into the state of mind and other circumstances of the petitioner, and to approve of some proper person or persons to receive and apply such income for his benefit, and to enquire and state what annual sum ought to be allowed for his maintenance and support.

Mr. *Kenyon Parker* and Mr. *Stinton*, for the petition, urged that the expenses of a commission of lunacy would be burdensome to the lunatic's estate, and that it would be for his benefit to continue the arrangement which had been acted upon during the life of his mother. They submitted, on the authority of *Eyre v. Wake* (a), and the observations of Lord *Brougham*, *In re Astley* (b), that, the lunatic being a party to the cause, and there being a fund in Court, the Court had jurisdiction to make the order prayed.

The

(a) 4 *Ves.* 795. See also *Machin v. Salkeld*, 2 *Dick.* 654. In both these cases, however, the property of the lunatic appears to have been much less than in the present.

(b) Cited in *Shelford's Law of Lunatics*, p. 445. In this and two other cases there referred to, applications were made to

the Court on behalf of lunatics, possessed of small property, but not being parties to any suits, to sanction the application of that property to their maintenance without requiring a commission to be taken out; and Lord *Brougham*, in giving judgment on the three cases, is stated to have observed, that he had

The LORD CHANCELLOR, after adverting to the irregularity which had been committed in continuing the payments to the mother of the lunatic after his minority had determined, said that a commission must be taken out: that whenever the Court had to provide, not simply for a temporary occasion, but for the permanent care and management of a lunatic and his property, it was inconvenient to deviate from the regular practice; and that looking at the amount of the property in this case, the expense of a commission afforded no ground for the application.

Petition dismissed.

1842.

GILBEE
v.
GILBEE.

no jurisdiction to make the orders prayed, as the lunatics were not parties to any suit in Chancery; that the circumstances disclosed by the petitions rendered his interference, if possible, very desirable; but that after having anxiously considered the cases on the subject, the result of his examination was, that he had no jurisdiction to make such orders as were prayed, in cases where no commission of lunacy had issued, and where the

lunatics were not before the Court as parties to a suit. He expressed his opinion, that the jurisdiction was established, and had been well exercised in the cases of lunatics who were before the Court as parties to suits, but that it had already been carried far enough, and that he would not extend it; and if the jurisdiction were defective, it could be remedied only by the legislature.

1842.

DAVENPORT v. DAVENPORT.

I am, I believe
 on the way to
 a new, improved
 and - the very
 improvement of
 - you may be
 surprised at
 the improvement
 in the work which
 has been
 recently ac-
 complished. So be
 sure it that
 can be done
 without
 being first
 improved.

THE Defendant in this cause put in a demurrer and answer to the bill, which was a bill of discovery in aid of an action of ejectment. On the 25th of *July* 1831, the demurrer was allowed with costs; after which, on the 9th of *January* 1832, the Plaintiff obtained an order admitting him to sue in *formâ pauperis*, and in the month of *February* following he presented an appeal from the order allowing the demurrer, which appeal was in the following year dismissed with costs. On the 16th of the same month of *February* the Defendant obtained an order for the taxation and payment of the costs of the suit up to the time of the Plaintiff being admitted to sue in *formâ pauperis*. In the month of *March* following, the Master certified the taxed costs of the demurrer to amount to 33*l.* 12*s.* 6*d.*, and the taxed costs of the suit to 31*l.* 9*s.* 7*d.* In the month of *December* 1834 the Plaintiff was arrested and committed to the *Fleet* under an attachment for non-payment of the former amount, and he was subsequently detained under another attachment for non-payment of the latter amount. Neither of those sums having been paid, he had remained in prison ever since. A motion was now made for his discharge.

Mr. *Wright* and Mr. *Collyer*, in support of the motion.

There is no instance of a party who has been admitted to sue in *forma pauperis* being imprisoned for non-payment of costs. If he is vexatious you may move to dispauper him, but so long as he remains a pauper you cannot attach him; and the reason that has been given for

for that is, that it would be to imprison him for life: *Nokes v. Watts* (a), *Sloman v. Aynel* (b), *Anon* (c), *Brittain v. Greenville* (d), *Rice v. Brown* (e). In *Taylor v. Lowe* (g), it was even said, that so long as the admission stood it was absurd to make any rule about costs. It is true these were all cases at law, but in *Corbet v. Corbet* (h) Lord Eldon said, “that it was material to attend to the cases at law; and that as the jurisdiction for the relief of paupers originated in a statute (i), those decisions ought to be attended to as giving the doctrines, and supplying reasons by analogy.”

1842.

 DAVENPORT
 v.
 DAVENPORT.

The LORD CHANCELLOR.

I have, however, been furnished with two cases from the Registrar's book, which seem to shew that a different doctrine prevails in this Court, at least as to costs which have been given against the party before his admission to sue in *formâ pauperis*. One of them is the case of *Higgins v. Vaughan*, which came before the Lord Keeper in 1710 (k). The application, there, was, that the Plaintiff, who had been admitted to prosecute the suit in *formâ pauperis* in the progress of the cause, might be dispaupered, and might pay to the Defendant the costs which had been taxed against him, before he should be allowed to proceed any farther in the suit; and affidavits were read to shew that the party had prosecuted the suit in a vexatious manner. The order made upon that application was as follows:—“This Court doth declare that where any costs are given to a Defendant and the Plaintiff afterwards becomes a pauper, that

(a) *Fortescue*, 319., 1 *Str.* 420.

(b) *Fortescue*, 320.

(c) 2 *Salk.* 506.

(d) 2 *Str.* 1121.

(e) 1 *B. & P.* 39.

(g) 2 *Str.* 983.

(h) 16 *Ves.* 407., see 410.

(i) 11 *Hen.* 7. c. 12.

(k) *Reg. Lib.* A. 1710. f. 514.

1842.

 DAVENPORT
 v.
 DAVENPORT.

that doth not discharge such precedent costs ; and doth therefore order that all proceedings in this cause be stayed till the Plaintiff shall have paid the Defendant the said costs ; and the consideration, as to dispaupering the Plaintiff, is hereby reserved till after the said costs shall be paid."

In that case, therefore, it appears that the Court, thinking the conduct of the party vexatious, stayed proceedings, and ordered him to pay the costs before it dispaupered him. The other case goes still farther. It is the case of *Knowles v. Handley (a)*, which came before the Master of the Rolls in the year 1702. There, a pauper Plaintiff, after an answer had been put in, applied that his bill might be dismissed without costs ; but it appearing that he had been admitted in *formâ pauperis* since the answer came in, it was ordered that the bill should be dismissed with 20s. costs.

I find in a note to the case of *Jones v. Peerse* in *McClelland and Young's Reports (b)*, that, according to the practice on the plea side of the Exchequer, an order for the admission of a party in *formâ pauperis*, after the commencement of the suit, has a retrospective operation, unless opposed : and that if opposed, it is granted only on the terms of the party giving security for the costs previously incurred ; but when it is said, that the order is retrospective, that, I apprehend, does not apply to costs which have been actually disposed of and ordered to be paid, before the party's admission.

For the motion.

The only reported case against the Plaintiff is an anonymous case in *Moseley (c)*, where it is laid down that

(a) *Reg. Lib. A.* 1701. f. 5.

(c) P. 68.

(b) P. 282. ; see p. 283. n.

that a party, by getting himself admitted in *forma pauperis*, cannot discharge himself of costs that he was liable to before his admission. But *Moseley* is a book of no authority; and neither that case nor any of the others which have been cited, shew that a party can be imprisoned so long as he remains a pauper. It may be, that in a proper case, the Court would stay proceedings until the costs previously incurred should have been paid; but it is a very different thing to enforce the payment of them by imprisonment: it is believed that such a thing was never heard of before.

1842.

 DAVENPORT
 v.
 DAVENPORT.

Mr. *Richards* and Mr. *Mylne*, *contra*.

The anonymous case in *Moseley* has been recognized and acted upon in the later case of *Wilkinson v. Belsher* (a); but it is unnecessary to rely upon that authority, because no question can arise on this motion as to the retrospective operation of the order of admission; inasmuch as there is an order of subsequent date for the payment of the costs of suit up to that time, and this motion does not seek to discharge that order. Besides, it is not to be supposed that the Court would have made such an order unless there were some means of enforcing it, and to attempt to do so by staying proceedings until the costs should have been paid, would in this case be nugatory, because the suit, being merely for discovery, was at an end when the answer was put in.

The LORD CHANCELLOR.

The main question seems to be, whether the party must be dispaupered before you can proceed against him. It is insisted that, although the orders stand, you cannot enforce them without dispaupering him; but perhaps there may be no ground for dispaupering him.

The

(a) 2 Bro. C. C. 272.

1842.
DAVENPORT
v.
DAVENPORT.

The very costs which he owed under the first order, may have enabled him to make the affidavit upon which he obtained the order to sue in *formâ pauperis*; and it would be strange if, after having used that debt for the purpose of getting himself admitted, he should now be able, by means of the order for his admission, to escape from the payment of the same debt.

Mr. *Wright*, in reply.

The LORD CHANCELLOR.

In this case the party instituted a suit in the ordinary way: a demurrer was put in, and, upon that demurrer being allowed, he was ordered to pay certain costs. He then obtained an order to sue in *formâ pauperis*, and proceeded further in the suit. That order might perhaps have a retrospective effect on costs not disposed of at the time it was made; but I know no reason to hold that it should have that effect on costs which had previously been ordered to be paid. Neither can I consider it as having that effect upon the other costs previously incurred, when I find an order subsequently made, for the taxation and payment of those costs.

So long as those orders stand, I see no reason why they should not be enforced in the usual manner. As to the first, there is no more hardship in so enforcing it, than there would be in enforcing a previous judgment or decree against the same party in a distinct action or suit; and no one can say that that decree or judgment could not be enforced against him, merely because, in the meantime, he had obtained an order to sue in *formâ pauperis* in another suit. I see no substantial difference between a previous order for payment of costs in this suit, and a previous decree in another suit. If there was any irregularity in the orders, they ought to be got rid of; but so long as they

they stand, the party is bound to obey them; and not having done so, I am of opinion that he is not entitled to his discharge.

Motion refused with costs.

1842.

 DAVENPORT
 v.
 DAVENPORT.

Ex parte The Marquis of HERTFORD, In the Matter
 of the Stat. 5 *Vict.* c. 5.

July 13.

IN the month of *March* 1842, the executors of the late Marquis of *Hertford* sued out a *distringas*, under the 5th section of the stat. 5 *Vict.* c. 5., upon a sum of stock standing in the name of one *Suisse*, who had been valet to the Marquis, and who was, at the time of issuing the *distringas*, under a charge of felony for embezzling the money with which the stock had been purchased. That *distringas* having afterwards been removed, upon the usual notice from the Bank, the present Marquis, as residuary legatee of his late father, sued out another *distringas*, which, however, the Bank refused to attend to; and thereupon the Marquis applied for and obtained from Vice-Chancellor *Wigram*, under the 4th section of the same statute, an *ex parte* injunction to restrain the Bank from paying the dividends or allowing the transfer of the stock until further order. His Honor, however, on the motion of *Suisse*, made a subsequent order dissolving that injunction with costs; but by an arrangement between the parties the order was suspended, until an appeal motion to discharge it could be heard before the Lord Chancellor.

Semble, that the remedies given by the fourth and fifth sections of the 5 *Vict.* c. 5. are cumulative; and consequently, that a party, who has sued out a *distringas* under the fifth section, is not thereby precluded from afterwards applying for an injunction under the fourth section.

1842.

Ex parte
The
Marquis of
HERTFORD.

1841.
Dec. 16, 17.

On that motion being now made, it was said, that *Amyot's Case* (a) had been cited in the Court below, as an authority for the proposition, that a party who had sued

(a) *Ex parte* JEAN BAPTISTE AMYOT, In the Matter of the Stat. 5 Vict. c. 5.

The remedies given by the fourth and fifth sections of 5 Vict. c. 5. are in substitution for the writ of *distringas* under the former practice in the Exchequer: and therefore, where a party had put a *distringas* upon a sum of stock before the passing of that act, and that *distringas* had been removed upon the usual notice, Held that it was not competent to him after the passing of the act, to apply for an injunction under the fourth section of it.

Previously to the passing of the stat. 5 Vict. c. 5., *Jean Baptiste Amyot*, as the personal representative of one *Pierre Aimable de Bonne* deceased, had brought an action against *Catherine Monro*, the widow and executrix of *David Monro* deceased, upon a bond executed by *David Monro* to *P. A. de Bonne* for the sum of 2500*l.* and interest, in aid of which action he had also filed a bill of discovery in the Court of Exchequer, and had sued out of the same Court a writ of *distringas* to restrain the transfer, and payment of the dividends, of a certain sum of stock standing in the name of *David Monro*, and forming part of his personal estate. On the 25th of October 1841, which was subsequent to the passing of the 5 Vict. c. 5., *J. B. Amyot* received a notice in the usual form from the Bank of *England*, stating that an application had been made for the dividends of the stock, and that unless a bill were filed, and an injunction obtained and served on or before the 1st of November

then next, the *distringas* would no longer be regarded. No bill, however, was filed by *Amyot* within the period mentioned in the notice; but on the 1st of November 1841 he obtained an order *ex parte* from the Lord Chancellor, under the fourth section of the statute, for an injunction to restrain the transfer of the stock, and the payment of the dividends, until further order.

On a motion being subsequently made on behalf of *Catherine Monro* to discharge that order, several points were raised:—1st, that *Amyot* being a mere general creditor of *D. Monro*, was not a party “interested in the stock” within the meaning of the act; 2dly, that it did not appear that he had obtained the order with any intention of following it up by a bill, it being contended that the summary injunction given by the fourth section was only a provisional remedy until an injunction could be regularly obtained upon a bill being filed; lastly,

sued out a *distringas* under the fifth section of the statute, could not afterwards obtain an injunction under the fourth section.

The

1842.

Ex parte
The
Marquis of
HERTFORD.

that the remedies given by the fourth and fifth sections of the act, even supposing them to be cumulative as regarded each other, were, at all events, substitutional for the remedy, by *distringas*, under the old practice in the Exchequer; and that as the party had in this case exhausted the old remedy, he was not entitled to avail himself of the new ones.

Mr. *Richards* and Mr. *Wilbraham* appeared in support of the motion.

Mr. *Wakefield* and Mr. *Beales*, *contra*.

Dec. 17. *The* LORD CHANCELLOR.

In this case an *ex parte* injunction has been obtained under the recent act, for the same matter for which a writ of *distringas* had been previously sued out in the Court of Exchequer. The writ of *distringas* was granted under the old practice, and this afforded an opportunity of instituting a suit for relief, the property being secured in the meantime. The practice was for the Bank, upon an

application being made for a transfer, to give notice of it to the party who had obtained the writ, and unless a bill was filed and an injunction obtained within a limited time, a week, I believe, the benefit of the *distringas* was withdrawn.

This was the position of things when the act came into operation for the transfer of the jurisdiction of the Court of Exchequer to this Court. If the original jurisdiction had continued, the party would have had no right to sue out a second writ of *distringas*, or, if such second writ had been sued out, the Bank would have paid no attention to it.

It does not appear to me that the party should be in a better position than he would have stood in if this act had not passed. I think, therefore, that independently of the other considerations adverted to in the argument, the party in this case ought not, after having had the full benefit of the writ of *distringas*, to have afterwards applied

1842.

Ex parte
The
Marquis of
HERTFORD.

The LORD CHANCELLOR, however said, that he had not intended, in *Amyot's* case, to lay down any such rule; having merely decided that a party who had exhausted his remedy under the old practice in the Exchequer, could not afterwards avail himself of the remedies given by the recent statute.

In the further progress of the argument it appeared that, as to part of the stock, there was not sufficient evidence to identify it with the money alleged to have been embezzled, so that the motion, to that extent, failed upon the merits; and *Suisse* being content to be allowed to sell that portion of the stock for the supply of his present necessities, it was arranged that, as to the rest, the Vice-Chancellor's order should be still further suspended, so that it became unnecessary to make any adverse order upon the present occasion. But the Lord Chancellor, in conclusion, desired that it might not be understood to be his opinion that a party was precluded, by suing out a *distringas* under the fifth section, from afterwards applying for an injunction under the fourth.

Sir C. Wetherell and Mr. Schomberg appeared in support of the motion.

Mr. Sharpe and Mr. Degex, *contra*.

<p>plied for an injunction under the fourth section of the new act; and as I think that the order in question would not have been made if all the</p>	<p>circumstances had been fully disclosed to the Court, it must be discharged with costs.</p>
---	---

1842.



1841.

Feb. 11. 13.

1842.

Nov. 11.

ALLEN v. MACPHERSON.

THIS was an appeal from an order of the Master of the Rolls, overruling a general demurrer to the bill.

The bill stated that *John Allen*, the testator after-mentioned, was born and passed the early part of his life at *East Chinnock*, in the county of *Somerset*, in which parish his family had lived for several generations, and that, though he afterwards left that neighbourhood for the purpose of carrying on business in *London*, where he amassed a large fortune, he continued through life to retain a strong interest in the affairs of his native place, and always entertained a great regard for the members of his family resident there, amongst whom were the Plaintiff, and his brother and sister, *Thomas Allen* and *Susannah Allen*, the children of a nephew of the testator, who died previously to the date of his will.

That the testator made his will bearing date the 11th of *December* 1834, and thereby, after bequeathing a legacy of 20,000*l.*, 3*l.* 10*s.* per cent. bank annuities, upon certain trusts for the benefit of the Defendant

Susannah

A testator having by his will bequeathed a legacy to the Plaintiff, and made *S. E.* his residuary legatee, executed several codicils, by which he gave to the Plaintiff further legacies, and one fourth share of his residuary estate. He afterwards executed another codicil, by which he revoked all former bequests to the Plaintiff, giving him a small annuity in lieu thereof, and at the same time made a reduction in legacies which he had previously given to some of the Plaintiff's relations.

The will and all the codicils having, after litigation in the Ecclesiastical Court, been admitted to probate, the Plaintiff filed his bill, alleging that the testator had been induced to execute the last codicil solely through certain false and fraudulent representations which had been made against his (the Plaintiff's) character at the instance of *S. E.*, and that in the Ecclesiastical Court he had not been permitted to take any objections to that codicil, except such as went to the validity of the whole instrument, and praying therefore that the executors or *S. E.* might be declared trustees for him to the amount of the bequests revoked by that codicil: Held, upon demurrer, reversing the decision below, that the Court had no jurisdiction to entertain the bill.

1842.

ALLEN
v.
MACPHERSON.


Susannah Evans (who was his only legitimate child, and was then married to the Defendant *George Evans*), for her separate use, he gave various bequests to his relations at *East Chinnock*, and, amongst others, a legacy of 4000*l.* to the Plaintiff and his brother and sister; after which he gave his residuary estate and effects, which were of large amount, upon the same trusts as the legacy of 20,000*l.* stock, and appointed the Defendants *Richard Macpherson* and *Samuel Tomkins* executors of his will.

That the testator made several codicils to that will, and that by the fourth of those codicils, which was the only one previous to the sixth that affected the Plaintiff's interests, and which bore date the 16th of *November* 1836, he bequeathed to the Plaintiff, and the other children of his said deceased nephew, additional legacies of 2000*l.* each, in the event of his daughter *Susannah Evans* dying in her husband's lifetime.

The bill then stated that up to the month of *March* 1837 the Plaintiff had not had much personal intercourse with the testator, who consequently felt no regard for him beyond what he entertained for his *Somersetshire* relations in general; but that the Plaintiff having, in the early part of that month, spent a few days with the testator at his residence, the testator then conceived a strong affection and preference for him, and became desirous of making a further provision for him, and that he accordingly made a sixth codicil to his will, bearing date the 23d of *March* 1837, whereby he bequeathed to the Plaintiff a fourth part of the clear residue of his estate and effects.

That,

That, shortly after the execution of that codicil, the contents of it were communicated by an attorney's clerk, who had been employed in preparing it, to the Defendants *Susannah Evans* and *William Allen*, the latter of whom was an illegitimate son of the testator, and on terms of the closest intimacy with *Susannah Evans*, who had, it was alleged, entered into a secret agreement to divide with him whatever benefits she might herself derive under the testator's will. That in consequence of that communication, *William Allen* and *Susannah Evans* became jealous of the Plaintiff, and formed a determination to procure a revocation of the sixth codicil, or at least a great diminution of the bequest thereby made to the Plaintiff.

1842.

 ALLEN
 v.
 MACPHERSON.

That, in the month of *June* 1837, the testator fell into a very infirm state, both of body and mind, from which he did not afterwards recover, and that whilst he was in that condition, the Defendant *Susannah Evans*, who was then residing with him, acquired a great influence over him, which she used in promoting the above-mentioned designs of herself and *William Allen*; and that all the testamentary instruments which were executed by the testator subsequently to the sixth codicil were made under her influence.

The bill then, after alleging that up to the month of *June* 1837, when the testator's intellects began to fail, he had not been on cordial terms with the Defendant *William Allen*, and had placed no confidence in him, stated, that by a seventh codicil to his will, bearing date the 13th of *August* in that year, he appointed that Defendant to be an executor of his will jointly with the Defendants *Richard Macpherson* and *Samuel Tomkins*. And, after noticing an eighth codicil to the will, which did not affect the Plaintiff's interests, the

1842.

ALLEN

v.

MACPHERSON.

bill went on to allege that in or about the month of *May* 1837, the Plaintiff's brother *Thomas Allen* formed the resolution of marrying a woman of bad character, which marriage was strongly opposed by the Plaintiff and *Thomas Allen's* other relations; and that, an anonymous letter having been sent to the testator on the subject, which *Thomas Allen* erroneously supposed to have been written by the Plaintiff, he became exceedingly irritated against him, and, in revenge, wrote several letters to the testator, at different times between the months of *May* and *September* 1837, in which he sought to prejudice him against the Plaintiff, and made many injurious statements against the Plaintiff's character. That, in consequence of the enfeebled state of the testator's faculties, those statements occasioned him great perplexity and annoyance, of which *Susannah Evans* availed herself for the purpose of furthering her designs against the Plaintiff, and with that view she suggested to the testator to send *William Allen* to *East Chinnock* to inquire into the respective characters of the Plaintiff and his brother, and the circumstances of the dispute between them. That the testator accordingly authorised *William Allen* to do so; but that although, to deceive the testator, he went into the Plaintiff's neighbourhood, he did not, when there, make any inquiries, or at least any honest or *bonâ fide* inquiries, respecting the Plaintiff, but occupied himself (in pursuance of a previous arrangement with *Susannah Evans*) in preparing a pretended report, having no foundation in fact, in which he represented the Plaintiff's habits and conduct to be of the lowest and worst description, and which he ended with a suggestion that if any thing were to be done for the Plaintiff, an allowance should be given him of 10s. per week, to be received during good behaviour.

1842.

ALLEN
v.
MACPHERSON.

That, on the 2d of *October* 1837, *William Allen* went with this pretended report to the testator's house, and, after reading it over to him there, obtained permission from him, after some hesitation, to get a codicil prepared in conformity with the suggestions contained in it. That a ninth codicil to the testator's will was accordingly drawn up, the next day, by a solicitor employed for that purpose, partly from the suggestions contained in the report, and partly from further instructions communicated to the solicitor by *William Allen* verbally; and that by that codicil, which was executed by the testator the same evening, without any draft being previously submitted to him for his perusal, he revoked all the legacies given by his will and previous codicils, both to the Plaintiff and to his other relations at *East Chinnock*, and in lieu thereof gave other legacies of small amounts, amongst which the only bequest made to the Plaintiff consisted of the dividends of a sum of 800*l.* 3 per cent. Bank annuities, which were directed to be paid to him during his life, or until he should attempt to sell or encumber the same, by weekly instalments.

The bill then alleged that the affection and regard entertained by the testator for the Plaintiff, and which induced him to execute in his favour the sixth codicil above mentioned, remained unabated until he heard the said pretended report of the Defendant *William Allen*, as to his character and conduct, and that it was solely through the reliance which the testator placed in the truth of that report, which was, however, a mere fabrication, concocted by *William Allen*, with the assistance, or at least the connivance, of *Susannah Evans*, that he was prevailed upon to assent to the preparation and execution of the ninth codicil; and that, if it had not been for that report, the testator would have allowed the
bequests

1842.

ALLEN

v.

MACPHERSON.

bequests which he had previously made to the Plaintiff to remain unrevoked.

The bill further stated, that within a few days after the execution of the ninth codicil, the testator became totally imbecile, and remained in that condition up to the time of his death, which took place on the 28th of *November* 1837. That the will, together with all the nine codicils, were afterwards admitted to probate, notwithstanding an attempt on the part of the Plaintiff to exclude the ninth codicil on the ground that the testator was of unsound mind at the time of executing it, and also that undue influence had been exercised over the testator's mind by *William Allen* in procuring the execution of it. The bill alleged, however, that in the suit in the Ecclesiastical Court respecting the validity of the ninth codicil, the Plaintiff was confined by the Court to those grounds of objection which affected the codicil as an entire instrument, and was not permitted to enter into the case stated in the bill, or into any other case relating exclusively to those parts of the codicil which affected the Plaintiff alone.

The bill prayed a declaration that the Plaintiff was entitled to the several bequests and legacies given to him by the will, and the first eight codicils thereto, notwithstanding the revocation of such bequests and legacies contained in the ninth codicil; and that the Defendants *Richard Macpherson*, *Samuel Tomkins*, and *William Allen*, or the Defendant *Susannah Evans*, might be declared trustees for him to the amount of such bequests and legacies.

The demurrers were put in by the Defendants, the executors, and *Susannah Evans*, apart from her husband, and upon those demurrers being overruled, the same Defendants appealed.

The

The appeal now came on to be heard.

1842.

Mr. *Richards*, Mr. *Russell*, and Mr. *Giffard*, in support of the appeal.

ALLEN
v.
MACPHERSON.

Whatever may have been the circumstances which led to the execution of the ninth codicil, it is not disputed that that instrument correctly represents the ultimate wishes of the testator, and that, at the time when it was made, all intention of bounty towards the Plaintiff had, *de facto*, ceased. What the Plaintiff asks then of the Court is, in effect, to re-create that intention of bounty; to import into the mind of the testator a purpose which he had abandoned. But there is nowhere a jurisdiction to do this. The sole business, whether of this Court or of the Ecclesiastical Court, is to ascertain and give effect to the actual dying intentions of a testator, and independently of the danger of speculating, in any case, upon the motives by which a testator has been influenced, the knowledge of those motives, even if it could be obtained, would not justify any court in assuming to itself the functions of the testator, and disposing of his property in a manner which he has not in fact authorised.

But even supposing a proper case to be stated for inquiry before some tribunal, the Plaintiff is at all events concluded by the result of the proceedings in the Ecclesiastical Court; and it is a complete answer to the bill, that it seeks, in substance, a reversal of the decision of that court in a matter over which it has exclusive jurisdiction: *Plume v. Beale* (a), *Kerrich v. Bransby* (b), *Ex parte Fearon* (c), *Pemberton v. Pemberton* (d), *Gingell*

(a) 1 *P. Wms.* 388.

(b) 7 *Bro. P. C.* 437.

(c) 5 *Ves.* 633.; see p. 647.

(d) 13 *Ves.* 290.; see p. 297.

1842.

ALLEN

v.

MACPHERSON.

gell v. Horne. (a) There are indeed cases where, in order to give effect to the real intentions of a testator, this Court has engrafted a trust, in favour of an intended legatee, upon an express bequest to another party; *Marriot v. Marriot* (b), *Podmore v. Gunning* (c), *Denys v. Locock* (d): or upon an executor's legal interest in the residue; *Segrave v. Kirwan* (e): and, on the same principle, where a testator had been induced by his heir at law, who was an attorney, to levy a fine of his real estate, which had, contrary to the testator's intention, the effect of revoking a previous will, this Court declared the heir a trustee for the individuals who would have taken under the will; *Buckley v. Welford* (g): but it is material to observe that in all those instances the interference of the Court was exerted in favour of persons who had remained, to the last, objects of the testator's bounty; besides which, in none of them was the interference of such a nature as to lead to any conflict of jurisdiction between this Court and the Ecclesiastical Court; whereas, in the present case, the undue influence, which is insisted upon as the foundation of the Plaintiff's equity, was expressly relied upon also in the Ecclesiastical Court; and the case of *Plume v. Beale* (h) shews that there is no real distinction, with reference to the jurisdiction of that Court, between cases where the whole of an instrument, and those in which part of it only, is objected to.

Mr. Girdlestone and Mr. Jolliffe, for the Respondent.

It must be conceded that, upon the facts stated in the bill, the Plaintiff is, in some court, and in some mode,

(a) 9 *Sim.* 539.(e) 1 *Beatty*, 157.(b) 1 *Str.* 666.; see p. 673.(g) 2 *Clark & Fin.* 102.(c) 7 *Sim.* 644.(h) 1 *P. Wms.* 388.(d) 3 *Myl. & Cr.* 205.; see p. 229.

mode, entitled to relief. To say that the perpetrator of such a fraud as this is to be protected in the enjoyment of the fruits of it, would be at variance with the first principles of law and justice; and the only question, therefore, which admits of argument is, whether this Court is the proper tribunal for adjudicating upon the subject. It being, however, indisputable that this Court has a general jurisdiction in cases of fraud, does the mere circumstance that this is a matter relating to a will of personal estate, take it out of the ordinary rule? We are not here disputing the validity of the ninth codicil as a testamentary instrument: we admit that the testator had the intention to revoke his bequests to the Plaintiff, and that he has effectually done so; but as the benefits accruing to *Susannah Evans* by means of that codicil have been obtained by her own fraud, we contend that, by analogy to the principle recognized in numerous cases, and upon which the Master of the Rolls founded his judgment on the present demurrer, this Court has jurisdiction to declare her a trustee of those benefits for the party at whose expense they have been acquired; *Marriot v. Marriot* (a), *Barnsley v. Powel* (b), *Segrave v. Kirwan* (c), *Buckley v. Welford* (d), and *Podmore v. Gunning* (e): and, further, that that jurisdiction may be exercised in this case without incurring any conflict with the Ecclesiastical Court, inasmuch as it is part of the Plaintiff's case, that that Court cannot take cognizance of a fraud which goes only to part of an instrument; a defect of jurisdiction which Lord *Redesdale* has mentioned as constituting an exceptional ground for the interference of a court of equity. (g) Some of the authorities cited on the side

1842.

 ALLEN
 v.
 MACPHERSON.

(a) 1 *Str.* 666.

(e) 7 *Sim.* 644.

(b) 1 *Ves. sen.* 119. 284.

(g) *Treat. on Plead.* 257.;

(c) 1 *Beatty*, 157.

4th ed.

(d) 2 *Clark. & Fin.* 102.

1842.

 ALLEN
 v.
 MACPHERSON.

other side appear undoubtedly, at first sight, to be at variance with the principles above adverted to; but it is submitted that they are all distinguishable from the present case. In *Kerrich v. Bransby* (a) the bill prayed that the will might be cancelled, which was clearly improper, independently of which objection the case against the will was very doubtful upon the evidence; and in *Middleton v. Sherburne* (b) Lord Abinger, after commenting upon *Kerrich v. Bransby* at considerable length, came to the conclusion that that case must have been decided by the House of Lords upon the merits, and consequently that it was not an authority against the jurisdiction of this Court. As to *Plume v. Beale* (c), it has no application to the present case; for the question was not, whether there was an equity to fix upon an admitted bequest a trust for the benefit of another party, but whether a particular clause, which was alleged to be forged, did or did not form part of the will, a question which we admit to be within the exclusive jurisdiction of the Ecclesiastical Court. In *Gingell v. Horne* (d), likewise, the question belonged exclusively to the same jurisdiction, inasmuch as the alleged fraud went to the whole instrument.

Mr. *Richards*, in reply.

Nov. 11.

The LORD CHANCELLOR.

The testator in this case had bequeathed a considerable property to the Plaintiff by his will and subsequent codicils. He afterwards, by a further codicil (the ninth), revoked these bequests, and in lieu of them made a small pecuniary provision in his favour. It was alleged by the bill that this alteration was procured by false

(a) 7 Bro. P. C. 437.

(c) 1 P. Wms. 188.

(b) 4 Yo. & Coll. 558.; see
 p. 379.

(d) 9 Sim. 539.

false and fraudulent representations made by an illegitimate son of the testator, and by the Defendant *Susannah Evans*, his daughter, as to the character and conduct of the Plaintiff, *Susannah Evans* being the residuary legatee. To this bill the Defendants demurred. The Master of the Rolls overruled the demurrer, and from this judgment the Defendants have appealed.

1842.

 ALLEN
 v.
 MACPHERSON.

The question is one of considerable importance. The same objection of fraud, founded upon the same facts, was made in the Ecclesiastical Court upon the application for probate. It did not, however, prevail. This, then, is, in substance, an attempt to review the proceedings in that Court; for a sufficient case of imposition and fraud practised on the testator would have been a ground for refusing the probate.

There are, undoubtedly, cases where, fraud being proved, this Court has declared the party committing the fraud a trustee for the person against whom the fraud was practised; but none of these cases appear to me to go so far as the present. The case of *Segrave v. Kirwan* has no very close application to the question now before the Court. The Chancellor of *Ireland*, Sir *Anthony Hart*, declared the executor a trustee, as to the residue, for the next of kin. But in that case the testator never intended that the executor should take any benefit under the will. The rule, which then prevailed, that the executor was entitled to the residue unless otherwise disposed of, except where a legacy was bequeathed to him by the will, was a rule of interpretation or construction. The learned Judge considered that it was the duty of the executor who prepared the will, and who was a gentleman of the bar, to have informed the testator that such was the rule. He was not allowed to profit from this omission, and was therefore decreed to be

1842.

ALLEN
v.
MACPHERSON.

be a trustee for the next of kin. The Ecclesiastical Court had no authority to order this. They had no power to do what the justice of the case required.

So, in *Kennell v. Abbott* (a). There, a fraud had been practised, and the question was one of intention. The testatrix intended the legacy for her husband. The legatee had fraudulently assumed that character. The Master of the Rolls, Sir *Pepper Arden*, came to the conclusion, that the character he had so assumed was the only motive for the gift. The law, therefore, he said, would not permit him to avail himself of the testatrix's bounty.


In the case of *Marriot v. Marriot*, which is mentioned in *Strange* (b), and also in Chief Baron *Gilbert's Reports* (c), it does not appear what was the nature of the imputed fraud. The cause was compromised, and the judgment, according to the report in *Gilbert*, was written by the learned Judge, but not delivered. He says that a court of equity may, according to the real intention of the testator, declare a trust upon a will, although it be not contained in the will itself, in these three cases. First, in the case of a notorious fraud upon a legatee; as, if the drawer of a will should insert his own name instead of the name of the legatee, no doubt he would be a trustee for the real legatee. Secondly, where the words imply a trust for the relations, as in the case of a specific devise to the executors, and no disposition of the residue. Thirdly, in the case of a legatee promising the testator to stand as a trustee for another. And nobody, he adds, has thought that declaring a trust in these cases is an infringement upon the ecclesiastical

(a) 4 *Ves.* 802.

(b) P. 666.

(c) P. 203.; see p. 209.

siastical jurisdiction. These are the only positions, laid down in the intended judgment, which are applicable to the present question. They do not admit of dispute, but are very distinguishable from the case now under consideration. It is sufficient to observe that in none of these instances would the Ecclesiastical Court be competent to afford relief. The same remarks will apply to the case, also, of *Kennell v. Abbott*, which I have already mentioned.

1842.

 ALLEN
 v.
 MACPHERSON.

But in *Plume v. Beale* (a), where a legacy was introduced by forgery, Lord Chancellor *Cowper* refused to interfere, saying it might have been proved in the Ecclesiastical Court with a particular reservation as to that legacy. There the interference of the court of equity was unnecessary. The question might have been settled by the Ecclesiastical Court. In the case of *Barnley v. Powel* (b), Lord *Hardwicke* says that fraud in making or obtaining a will must be inquired into and determined by the Ecclesiastical Court, but that fraud in procuring a will to be established in that Court—fraud, not upon the testator, but upon the person disinherited thereby, might be the subject of inquiry in this Court. Fraud, he says, in obtaining the will, infects the whole, but the case of a will in which the probate has been obtained by fraud upon the next of kin, is of another consideration; and Lord *Apsley*, in the case of *Meadows v. The Duchess of Kingston* (c), recognises this distinction.

But the case which has the closest resemblance to this, is *Kerrick v. Bransby*, decided in the House of Lords. (d) It was alleged, in that case, that the will had been obtained by fraud and imposition practised on the

(a) 1 P. Wms. 188.

(c) Amb. 762.

(b) 1 Ves. sen. p. 284.

(d) 7 Bro. P. C. 437.

1842.

ALLEN
v.
MACPHERSON.

the testator; and the Chancellor, Lord *Macclesfield*, was of that opinion, and pronounced a decree, the effect of which was, to deprive the legatee of all benefit under it. It is true that the prayer of the bill was that the will might be cancelled; but the decree did not do more than direct the legatee to account for the testator's personal estate, and that what should appear to be in his hands should be paid over to the Plaintiff, and that, if necessary, the Plaintiff should be at liberty to use the legatee's name to get in the debts or other personal estate of the testator; in substance, declaring him a trustee for the Plaintiff. But this judgment was reversed on appeal in the House of Lords. It was suggested at the bar, upon the argument in the present case, that the decree might perhaps have been reversed on the merits. That, however, has not been the understanding of the profession, and Lord *Hardwicke*, who probably was acquainted with the history of the case, expressly states in *Barnsley v. Powel*, that it was decided on the question of jurisdiction. Lord *Eldon* also, in *Ex parte Fearon* (a), observes that it was determined in *Kerrick v. Bransby*, that this Court could not take any cognizance of wills of personal estate, as to matters of fraud.

I am of opinion therefore, as well on authority as on principle, that the demurrer was proper, and ought to have been sustained.

(a) 5 *Ves.* 633.; see p. 647.

1842.

QUARRIER v. COLSTON.

May 9.
June 21.
Nov. 8.

THE bill in this cause, which was filed by the Plaintiff as personal representative of *G. W. Tobin* deceased, prayed that a memorandum of debt which had been given by the deceased, shortly before his death, to the Defendant, might be delivered up to be cancelled; and that the Defendant might be restrained from proceeding with an action which he had commenced against the Plaintiff, for the recovery of the sum mentioned in that memorandum.

The memorandum was in these words: —

“ I, *George Webb Tobin*, owe *J. M. Colston*, Esq. 525*l.* money received. *G. W. Tobin.*”

The bill alleged that the memorandum was given by *Tobin* when in a state of intoxication, and that it was wholly or in great part made up of sums which the Defendant had either won from *Tobin* at cards, or which he had lent to him for the purpose of gaming, while they were upon a tour together on the Continent. And after setting forth a correspondence which had taken place between the Plaintiff and the Defendant since the death of *Tobin*, in which the Defendant had admitted that a considerable part of the demand was of that nature, the bill charged amongst other things, that the Defendant had always refused to state the particulars of the amount for which the memorandum was given, and that he ought to set forth when and where, and in whose presence, and on what account &c., the

consideration

Gambling debts contracted in this country, as well as the securities given for them, are void and cannot be recovered. But money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the courts of this country. And, therefore, where an unascertained portion of a balance of account, for which an I. O. U. had been given, was admitted to consist of money lent for the purpose of playing at public tables in *Germany*, but it did not appear that the games played at such tables were forbidden by the laws of that country;

the Court, on appeal, dissolved an injunction which had been granted to restrain an action brought to recover the whole balance.

1842.
QUARRIER
v.
COLSTON.

consideration for the said memorandum and every part thereof was paid; and that without such discovery the Plaintiff could not safely proceed to trial in the action.


The Defendant by his answer stated that the memorandum had been given by *Tobin* when perfectly sober, upon the occasion of a settlement of accounts which had been come to between them shortly after their return from abroad; that the greater part of the sum in question, was due to him on account of the travelling expenses, of which he had paid more than his equal share; that about 25*l.*, other part of it, had been won by him from *Tobin*, at different times in the course of the tour, at cards, but in sums of less than 10*l.* at a sitting; and that the rest, but to what amount he could not tell, was due for monies lent by him to *Tobin* at the public tables at *Baden Baden* and other places in *Germany*, and had been employed by *Tobin* in gaming at such public tables. That, further than that, he could give no account of the particulars of his demand, inasmuch as he had delivered up all the memorandums and vouchers relating thereto to *Tobin*, when the settlement of accounts took place, at which the memorandum in question was given.

The Vice-Chancellor of *England* having granted an injunction upon payment of 525*l.* into Court, the Defendant moved by way of appeal, before the Lord Chancellor, to discharge his Honor's order.

Mr. *Wakefield* and Mr. *Bilton*, in support of the appeal motion.

As a bill for relief, this bill contains no equity. It may be true that this Court will entertain suits for the delivering

delivering up of securities for gambling debts: but an I.O.U. is not a security: it is merely evidence of a debt which this Court will not interfere with; *Wilkinson v. L'Eaucier*. (a) The I.O.U. is equivalent to an account stated between the parties: if the balance is compounded in part of money which cannot be recovered at law, the Plaintiff has a defence to so much: but, in fact, that is not the case; for the statute of *Anne* only avoids the security for a gambling debt; the debt itself remains, and may be recovered; *Robinson v. Bland* (b), *Alcinbrook v. Hall* (c), *Barjeau v. Walmsley* (d), *Wettenhall v. Wood* (e), *Cannan v. Bryce*. (g) But, even supposing that there were no such distinction, it does not appear, nor does the bill even allege, that the games for which this money was lent were illegal in the country where the loans were made, and, if not, why should not the money be recovered? The real object of the bill is to open a settled account: but that cannot be done without alleging and proving some item to be improper.

1842.

 QUARRIER
 v.
 COLSTON.

Mr. *Bethell* and Mr. *Austen*, *contrâ*.

The equity of the bill is, that by obtaining the I.O.U. the Defendant has thrown upon the Plaintiff the onus of impeaching the legality of the consideration. For that purpose it is necessary that the Plaintiff should know what particular part of the amount stated in the memorandum was made up of monies won at cards, or lent for the purpose of gaming. And as the Defendant has not thought fit to give that information by his answer, it is submitted that the Vice-Chancellor was right in considering that the only way of dealing with

(a) 2 Y. & Coll. 367.


(b) 2 Burr. 1077.; see p.1082.

(c) 2 Wils. 309.

(d) 2 Str. 1249.

(e) 1 Esp. 17.

(g) 3 B. & A. 179.; see p. 184.

1842.

 QUARRIER
 v.
 COLSTON.

with the case was, to have the whole amount of the demand paid into Court, and the account investigated before the Master. The supposed distinction between a gambling debt and the security for it, if any such ever existed, is now exploded by the late decision of the Court of Exchequer in *M'Kinnel v. Robinson*. (a) It is said that this claim is to be dealt with according to the *lex loci*, but if so, it must be the *lex loci solutionis*. If the claim is to be enforced in this country, the debt must be shewn to be a legal debt according to the law of this country.

Mr. Wakefield, in reply.

Nov. 8.

The LORD CHANCELLOR.


I do not perceive in this case any sufficient ground for restraining the Defendant from proceeding in his action at law. The memorandum is *prima facie* evidence of the debt, and there is nothing either in the Defendant's answer, or to be collected from the correspondence, shewing that the consideration of the claim was illegal.

The Defendant and the testator travelled together on the Continent. They agreed to divide their expenses; the Defendant paid more than his proportion, and the difference constitutes a part of the debt. With respect to this, no objection has been made.

Another part of the debt consisted, as stated in the answer, "of money lent to the testator when he was playing at the public tables at *Baden Baden*, and other places in *Germany*, which money was employed by him
 in

(a) 3 *Moe. & Wels.* 434.

in gaming at such public tables." What ground is there for saying that this cannot be recovered? First, it does not appear what the games were, or that they would have been illegal even in *England*; and until the late case of *M'Kinnel v. Robinson*, in the Court of Exchequer, it had always been supposed, and there are several decisions to that effect, that though securities given for money lent to play at certain games were void by the statute of *Anne*, yet that the money itself might be recovered; *Barjeau v. Walmsley* (a), *Robinson v. Bland* (b), *Wettenhall v. Wood*. (c) But in the case to which I have referred of *M'Kinnel v. Robinson*, it was held, and I think properly held, that money lent to play at an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action. But this rule does not apply to the present case. For there is nothing to shew that the public gaming tables where the money was lent were not lawful in the countries where they were held: on the contrary, the presumption is, that, as they were public, they were lawful; and if we might import our private knowledge into a case of this nature, (upon which, however, I do not mean to rely,) it is notorious that they are, in several places in *Germany*, sanctioned by the government, which receives a rent from the persons by whom they are kept. The Lord Chief Baron of the Exchequer, in giving judgment in the case of *M'Kinnel v. Robinson*, observes as to *Robinson v. Bland* (in which it was held that money lent to play with might be recovered), that the money was not lent to play at an illegal game, gaming not being unlawful in *France*,

1842.

 QUARRIER
 v.
 COLSTON.

(a) 2 *Str.* 1249.

(c) 1 *Esp.* 18.

(b) 2 *Burr.* 1077.

1842.
QUARRIER
v.
COLSTON.

France, where the loan was made. It does not appear therefore to me, that there is any thing to prevent the Defendant from recovering in respect of this part of the debt in his action at law.

The only remaining portion of the sum is the small amount stated to have been won at cards. It has not been shewn that this was an illegal transaction. There is nothing to shew that it was illegal by the laws of the country where the money was won, and it would not have been illegal here; for the Defendant, in his answer, states that he did not win so much as 10*l.* at any single sitting: and it has been decided in more than one case, that a sum under 10*l.*, won at cards, may be recovered; *Bulling v. Frost.* (a)

As the memorandum, therefore, affords *prima facie* evidence of the debt, and as there is nothing to shew that any part of it is founded upon an illegal consideration, I see no reason why this Court should interfere, or why the Defendant should not be allowed to prosecute his action.

(a) 1 *Esp.* 235.

1842.

M'FADDEN v. JENKYNs. (a)

June 21, 22.
Nov. 4.

IN the month of *February* 1841, *Thomas Warry* lent the sum of 500*l.* to the Defendant *Jenkyns*. In the month of *December* following *Thomas Warry* died, and the Defendant *George Warry* having shortly afterwards, as his personal representative, brought an action against *Jenkyns* to recover the 500*l.*, this bill was filed, alleging that the money was originally intended to be repaid in a short time, but that soon after the loan had been made, *Thomas Warry* sent a verbal message to *Jenkyns* by one *Bartholomew*, a common friend of their's, desiring him no longer to consider the money as due to him, *Thomas Warry*, but to hold it "upon trust for the Plaintiff, to be at her absolute disposal, for her own use and benefit." That *Bartholomew* delivered the message, and *Jenkyns* accepted the trust; and that the transaction was communicated to the Plaintiff both by *Thomas Warry* and by *Jenkyns*, and that *Jenkyns*, afterwards, during the lifetime of *Warry*, and with his knowledge, paid to the Plaintiff the sum of 10*l.* in part execution of the trust; and that *Thomas Warry* had never afterwards demanded payment of the money or any part of it.

The bill prayed, that it might be declared that, under those circumstances, *Jenkyns* became and was a trustee of the 500*l.* for the Plaintiff, and that he might be decreed to pay the 490*l.* residue thereof, to the Plaintiff, and that the Defendant *George Warry* might be restrained

A., shortly before his death, sent a verbal message to *B.* his debtor, desiring him to hold the debt in trust for *C.* *B.* accepted the trust, and the transaction was communicated to *C.* both by *A.* and *B.* Held, (on a bill filed by *C.* against *B.*, and the personal representative of *A.* who had brought an action against *B.* for the recovery of the debt,) that the trust, although voluntary, was binding upon *A.*'s estate; and an injunction, which had been granted by the Court below, was, on that ground, upheld on appeal, the Court being of opinion that the transaction amounted to the same thing as if *A.* had declared him-

(a) Reported below, 1 *Hare*, 458.

self, instead of *B.*, trustee of the debt for the Plaintiff.

1842.

 M'FADDEN
 v.
 JENKYNs.

strained from further proceeding in his action against *Jenkyns*.

The case made by the bill was verified by the affidavits of the Plaintiff, *Bartholomew*, and *Jenkyns*, and upon those affidavits Vice-Chancellor *Wigram* granted an injunction to restrain the prosecution of the action until the hearing of the cause, the Plaintiff submitting to pay the 500*l.* into Court.

The Defendant *George Warry* now moved, by way of appeal, before the Lord Chancellor, that the Vice-Chancellor's order might be discharged.

Mr. Wakefield and *Mr. Kenyon*, in support of the appeal motion.

If the alleged message from *Thomas Warry* to *Jenkyns* amounted to a complete gift, or an effectual release of the debt, *Jenkyns* has a good defence to the action; if it did not, no trust could be declared upon it which this Court will enforce in favour of a volunteer. *Colman v. Sarrel (a)*, *Ellison v. Ellison (b)*, *Antrobus v. Smith (c)*, *Pulvertoft v. Pulvertoft (d)*, *Ex parte Pye (e)*, *Bayley v. Boulcott (g)*, *Taylor v. Lendey. (h)* On either supposition the Plaintiff has no right to an injunction.

Mr. Sharpe and *Mr. G. Russell*.

The authorities relating to imperfect gifts have no application, for the Plaintiff does not ask the Court to complete an imperfect gift, but to execute a declared trust; and it has long been settled that a trust of personalty

(a) 1 *Ves.* jun. 50.

(b) 6 *Ves.* 656.

(c) 12 *Ves.* 39.

(d) 18 *Ves.* 84.; see p. 99,

(e) 18 *Ves.* 140.

(g) 4 *Russ.* 345.

(h) 9 *East*, 49.

sonalty may be declared by parol. It is said, however, that the relation of trustee and *cestui que trust* cannot be established unless the trustee has the legal right to the possession of the fund in question. But the case of *Collinson v. Pattrick* (a), in which a bond was assigned, and then a trust of it declared, shews that it is not necessary that the trustee should have the legal title; for in that case the legal title remained in the obligee. So, in *Wheatley v. Purr* (b), the debt remained due at law from the bankers to *Harriet Olliver*; and though it is true that in that case *Harriet Olliver* declared herself, and not the bankers, trustee, yet it can surely make no difference whether the donor directs his debtor to hold the money in trust for another, or whether he directs him to hold it in trust for the donee himself, as trustee for that other. The Plaintiff's case is, that the message to *Jenkyns* constitutes no defence to the action, but that it does constitute a complete declaration of trust, which this Court will enforce even at the instance of a volunteer.

1842.

M'FADDEN
v.
JENKYNs.

Mr. *Wakefield*, in reply.

It is not every transaction that will amount to a declaration of trust, merely by being represented under that form. The message from *Warry* to *Jenkyns* was more like a cheque upon a banker than a declaration of trust: it was merely an authority given by the creditor to the debtor to pay the debt to a third party, an authority which might, until acted upon, have been countermanded by the party who gave it, and which, so far as it had not been acted upon, was in fact determined by his death. But, even assuming that the alleged message was sent and delivered in the very terms stated in
the

(a) 2 *Keen*, 123.

(b) 1 *Keen*, 551.

1842.

M'FADDEN

v.

JENKYNs.

the bill — that it was, in form, a declaration of trust in *Jenkyns* — is that such a trust as this Court will execute in favour of a volunteer, the legal title to the fund in question not being in the trustee, but, by the Plaintiff's own admission, in a third party? Upon this point *Colinson v. Pattrick* has no application, for it decided nothing more than that this Court will give effect to an assignment of an equitable interest, although voluntary; a proposition, of which it is strange that there could ever have been any doubt. If the opposition to the Plaintiff's claim, in that case, had proceeded from *Catling*, it would have raised the point for which the case is now cited as an authority; but that was impossible, because *Catling*, by joining with Mrs. *Pownall* as Plaintiff in the original suit, had acknowledged himself a trustee for her, and therefore could not afterwards repudiate that relation as against her assignees — assuming that the assignees had a right to stand in her place, which the Court, of course, held that they had. As to *Wheatley v. Purr*, it is not necessary for us to question its authority, because, there, Mrs. *Olliver* had the legal title to the fund, and she declared herself a trustee, and not the banker. It is said, indeed, that that circumstance can make no difference; and that may be true as regards the intention; but in voluntary gifts form is substance, and it is immaterial what the intention was, unless it be carried into effect in a particular form. A volunteer, who seeks in this Court the execution of a trust in his favour, must shew two things; 1st, that a trustee has been completely constituted; and, 2dly, that a trust has been expressly declared: for the Court will neither complete the gift to the trustee if left imperfect, nor raise a trust by implication in favour of a volunteer; and yet one or other of these things is what the Court is asked to do by this bill. For as the only trust which is alleged to have been declared is a trust in *Jenkyns*, it

is only by implying a trust in *Warry*, or by completing the gift to *Jenkyns*, that the Court can give the Plaintiff any relief upon this record.

1842.

M'FADDEN
 v.
JENKYNs.

Nov. 4.

The LORD CHANCELLOR.

This was an appeal from a judgment of Vice-Chancellor *Wigram*, upon a motion for an injunction to stay proceedings at law. The facts stated in support of the motion were shortly these. The testator *Thomas Warry* had lent a sum of 500*l.* to the Defendant *Jenkyns*, to be returned within a short period. Some time afterwards *Warry* sent a verbal direction to *Jenkyns* to hold the 500*l.* in trust for Mrs. *M'Fadden*. This he assented to, and, upon her application, paid her a small sum, 10*l.*, in respect of this trust. The main question was, whether, assuming the facts to be as stated, this transaction was binding upon the estate of *Thomas Warry*. The executor had brought an action to recover the 500*l.* so lent to *Jenkyns*. It is obvious that the rights of the parties could not, with reference to this claim, be finally settled in a court of law; and, if the trust were completed and binding, an injunction ought to be granted.

Some points were disposed of by the Vice-Chancellor in this case, which are indeed free from doubt, and appear not to have been contested in this Court, viz. that a declaration by parol is sufficient to create a trust of personal property; and that if the testator *Thomas Warry* had, in his lifetime, declared himself a trustee of the debt for the Plaintiff, that, in equity, would perfect the gift to the Plaintiff as against *Thomas Warry* and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the present. The testator, in directing *Jenkyns* to hold the money in trust for the Plaintiff, which was
 assented

1842.

M'FADDEN
v.
JENKYNs.

assented to and acted upon by *Jenkyns*, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the Plaintiff.

The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the Court was not necessary to complete it. Such being the strong inclination of my opinion, and corresponding, as it appears to do, with that of the learned Judge in the Court below, and with the decision of the Master of the Rolls in the case to which he refers, I cannot do otherwise upon this motion, and in this stage of the cause, than refuse the application.

I must not, however, be understood as pronouncing any conclusive opinion upon the facts of the case. The witness *Bartholomew*, a professional gentleman, I believe, swears distinctly and in positive terms as to the direction given by the testator ; but there are some improbabilities in the case, and it is difficult to say, as the Vice-Chancellor justly observes, what may be the result at the hearing of the cause. As the appeal appears to have been encouraged, if not suggested by the Vice-Chancellor, the motion must be refused without costs.

1842.

In the Matter of JAMES WALTER THOMAS and SARAH THOMAS, Bankrupts.

Nov. 9.

THIS was an appeal, in the form of a special case, from the Court of Review.

The material facts, stated in the case, were as follows:—

Susannah Thomas, the mother of the bankrupts, kept an hotel in *Bristol* from the year 1835 until the 14th of *July* 1838, when she died intestate, leaving the bankrupts and two other children her only next of kin. Upon her death the bankrupt *Sarah Thomas*, who had up to that time lived with her and assisted her in the hotel, remained in possession of her estate and effects, including the stock and property in the hotel, and continued to carry on the business for about two months, at the expiration of which time by an agreement between her and the bankrupt *James Walter Thomas*, who had theretofore carried on the posting business of the hotel separately and on his own account, the two businesses were united, and were thenceforth carried on by the bankrupts in partnership together down to the month of *April* 1840, when *J. W. Thomas* being about to be married, it was agreed between him and *Sarah Thomas* that she should sell and relinquish to him all her right and interest in the business, and in the stock and effects then employed in it, for the sum of

875*l.*;

An innkeeper, who was a widow, having died intestate, two of her children, a son and daughter, took possession of her furniture and stock in trade, and carried on her business in their own names for two years after her death, during which time they paid her funeral expenses and some of her debts, but without taking out administration to her estate, and, at the end of that time, became bankrupts, the daughter having a few months previously retired from the business, and sold her share of it to the son.

Another of the children then took out administration

to the intestate, and claimed that part of her furniture and stock in trade which still remained in specie; but, Held that it belonged to the assignees, as having been in the order and disposition of the son at the time of his bankruptcy.

CASES IN CHANCERY.

875*l.*; and thereupon *Sarah Thomas* retired from the place where the partnership business was carried on, and a notice of the dissolution of the partnership was duly published in the *London Gazette*, and in the *Bristol* newspapers; and the name of *Sarah Thomas*, which had been painted on the front of the house where the partnership business had been carried on, was erased, and the name of *James Walter Thomas* alone remained. From that time until the fiat issued, *James Walter Thomas* remained in the sole possession of the stock and effects in the hotel, the greater part of which had belonged to the intestate, the rest having been added by himself and his sister since their mother's death.

The funeral expenses of the intestate and several of her debts were, after her death, paid partly by *Sarah Thomas*, and partly by *Sarah Thomas* and *James Walter Thomas* while they were in partnership; but no claim was made, by or on the part of any other of the next of kin of the intestate, to any part of her estate or effects, until after the issuing of the fiat. The fiat issued on the 14th of *October* 1840, and amongst other property then in the possession of *J. W. Thomas*, and which was sold by the assignees, was that part of the stock and effects in the hotel which had formerly belonged to the intestate, amounting in value to about 1060*l.*

On the 10th *December* 1840, one of the other children of the intestate took out letters of administration to her estate; and, having done so, he presented a petition to the Court of Review, praying that the assignees might account for, and pay over to him, the value of that part of the property and effects so sold by them, which had formerly belonged to the intestate. And the Court of Review made an order accordingly.

The

The special case, which was stated at the instance of the assignees, now came on to be argued.

1842.

In re
THOMAS.

Mr. *Russell* and Mr. *Bacon*, for the assignees, relied on the case of *Fox v. Fisher* (a), in which it was held, that possession of the goods of an intestate, for several years, by a party who had made himself executor *de son tort*, gave to his assignees, upon his afterwards becoming bankrupt, a preferable title to that of a creditor of the intestate, who claimed them under a grant of administration obtained subsequently to the bankruptcy. They further contended, however, that the title of the assignees was sustainable upon the broader principle laid down in *Ray v. Ray* (b), where the question arose between a party who had seized property of a testator in execution of a judgment recovered against the executor personally, and a creditor of the testator, who had for several years allowed the executor to deal with the property as his own; and it was held that the execution creditor had the better title. The doctrine supposed to have been laid down in the case of *Farr v. Newman* (c), that the goods of a testator in the hands of his executor could not, under any circumstances, be seized in execution, by a creditor of the executor in his individual character, had been reviewed by Lord *Eldon* in *M'Leod v. Drummond* (d), and his Lordship was of opinion that the proposition had been too broadly stated.

Mr. *Swanston* and Mr. *Osborn*, *contra*, said, they did not dispute the correctness of the decision in *Fox v. Fisher* with reference to the point which was there discussed, but that the Court of law, in which that case occurred

(a) 3 B. & A. 135.

(c) 4 T. R. 621.

(b) *Coop.* 264.

(d) 17 Ves. 152.; see p. 168.

1842.

In re
THOMAS.

curred, had considered it solely with reference to the doctrine of order and disposition, and without advert-
ing to the rule, that trust property in the hands of a bankrupt did not pass to his assignees. That might have been, because, in *Fox v. Fisher*, it did not appear, as it did in the present case, that the party in possession of the goods had paid any of the intestate's funeral ex-
penses and debts, or otherwise dealt with them in the character of a trustee. That was one material circum-
stance which distinguished the two cases. Another cir-
cumstance, which applied both to *Fox v. Fisher* and *Ray v. Ray*, was the length of time during which the party had continued in possession of the goods. In *Fox v. Fisher* it was eleven years; in *Ray v. Ray* between six and seven years; whereas, in the present case, it was only two.

The LORD CHANCELLOR.

I do not think that makes any difference; two years bring it within the principle.

Mr. *Russell*, in reply.

The LORD CHANCELLOR.

I think this is not a case of trustee at all. The parties have been in possession of the property as wrong-
doers. First, the daughter takes possession and carries on the business; after carrying it on for about two months she admits her brother into partnership, and they carry it on in their joint names for a certain time. Then another transaction takes place between them. The daughter sells her share to her brother, and retires from the business. From the beginning to the end, they deal with the property as their own. The mere cir-
cumstance of their having, in a few instances, paid debts
of

of the intestate, is entitled to very little weight; for, probably, the object was, merely to quiet the claims of other persons who might have disturbed their possession. This brings the case, therefore, strictly within that of *For v. Fisher*, decided some years ago. The judgments of the Chief Justice and of Mr. Justice *Bayley* state distinctly the grounds of that decision. And as it is desirable that the law should be uniform, and as I am satisfied with the grounds assigned for the decision in that case, I think the judgment of the Court below in this case must be reversed.

1842.

In re
THOMAS.

OLIVER v. LATHAM.

Dec. 5.

THIS was a suit, by a person claiming to be perpetual curate of the parish of *Barlaston*, against certain of the parishioners, for tithes. The defendants by their answer, amongst other defences, set up a modus as to part of their lands; in support of which defence they examined one *John Aston*, who, though not interested in any of the lands which were the immediate subject of the suit, was owner and occupier of other lands in the parish which were covered by the alleged modus. At the hearing of the cause before Vice-Chancellor *Knight Bruce*, his Honor rejected the evidence of *Aston*, and by his decree, amongst other things, directed an issue to try the validity of the modus. Both sides appealed from the decree, and on the rehearing of the cause before the Lord Chancellor, the same evidence was again tendered and objected to.

The 26th section of the 3 & 4 W. 4. c. 42. by which witnesses, who were before incompetent by reason that the verdict or judgment in the pending action might be used as evidence for or against them in another proceeding, were rendered competent by enacting that such verdict or judgment should not be so used, applies to courts of equity as well as to courts of law.

Mr. *Spence* and Mr. *Eagle*, in support of the objection.

M 2

If

1842.

OLIVER
v.
LATHAM.

If the witness is admissible at all, it can only be under the stat. 3 & 4 *W. 4. c. 42. ss. 26, 27.* But that provision of the statute does not apply to courts of equity, for the reason stated by the Master of the Rolls in *Holden v. Hearn* (a), and adverted to by Baron Alderson in *Barnes v. Stewart* (b), namely, that the recital of a witness's name in the decree of a Court of Equity is not equivalent to the indorsement of his name on the record at law, inasmuch as it has not the effect of removing his bias at the time of his examination. It is true, that in *Wheat v. Graham* (c), the Vice-Chancellor of *England* is reported to have expressed a different opinion; but, on a subsequent occasion, in *Hall v. Ellis* (d), his Honor, after a careful review of the act, came to the conclusion, that with the exception of the forty-second section, it applied to courts of law only. Independently, however, of this objection, we submit that the interest of this witness in the event of the suit, is of such a nature, that even at law the statute could not make him competent. For it has been repeatedly held, that the statute applies exclusively to those cases in which the only interest of the witness is, that the verdict or judgment might be used for or against him in another proceeding. If the witness has a *scintilla* of interest in the result of the suit beyond that, the statute does not apply; *Burgess v. Cuthill* (e), *Stanley v. Jobson* (g), *Green v. Warburton*. (h) Now, what the witness in this case comes to prove is a district modus, which, if established, will cover his own land. It is true, that his own land is not in question in this particular suit, but it cannot be doubted that any judicial decision in favour of a modus, as regards any of the occupiers of land within

(a) 1 *Beav.* 445.; see p. 449.(b) 1 *Y. & Coll.* 123.(c) 7 *Sim.* 61.(d) 9 *Sim.* 530.(e) 1 *M. & Rob.* 315.(g) 2 *M. & Rob.* 103.(h) 2 *M. & Rob.* 105.

within its alleged limits, tends to establish it as to all; and if every parishioner might, in turn, be a witness for every other, the *modus* might, in the end, be established altogether by the evidence of interested parties.

1842.
OLIVER
v.
LATHAM.

Mr. Boteler, contra.

The case of *Hoyle v. Coupe* (a), which was decided in the Court of Exchequer on the very same day that this cause was under discussion in the court below, is decisive as to the application of the statute to a case of this kind, at law; for there, a copyholder was called as a witness to prove a custom to get stones within the manor, and it was held that he was competent under the statute, although his evidence was attempted to be excluded on the same grounds which have been urged in the present case. That authority, therefore, reduces the question to the simple point, whether the statute applies to courts of equity.

The LORD CHANCELLOR.

It would be a very great inconvenience if one rule of evidence were to prevail in this Court, and another in courts of law. But I do not think that a proper construction of these clauses will lead to any such result. The clauses contain two distinct provisions; one is matter of substance, the other of form. The twenty-sixth clause provides, "that if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action in which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined, but in that case a verdict or judgment in that action in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence

(a) 9 *Mec. & Wels.* 450.

1842.

OLIVER
v.
LATHAM.

dence for him, or any one claiming under him, nor shall a verdict or judgment against the party in whose behalf he shall have been examined be admissible in evidence against him or any one claiming under him.”—If the enactment had ended there, no question could have arisen. In the next clause, however, it is provided, “that the name of every such witness shall at the trial be endorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, and shall be afterwards entered on the record of the judgment; and such endorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceedings in which the verdict or judgment shall be offered in evidence.” This last section, it is true, applies exclusively to courts of law: but the first clause contains the substantial part of the enactment: what follows is a mere regulation for the sake of caution. Such a regulation was necessary in courts of law, where, generally speaking, the record contains no mention of the evidence on which the judgment was founded, but it is wholly unnecessary in courts of equity, where the decree recites the evidence.

I am therefore clearly of opinion, that this statutable rule of evidence applies to courts of equity, as well as to courts of law. As to the other point which has been argued, I shall admit the evidence on the authority of that case in the Exchequer, subject, of course, to any thing *Mr. Spence* may say in his reply, if he thinks that the case of a *modus* can be distinguished from that of a manorial custom.

The point was not further adverted to in the argument, and no judgment has yet been pronounced upon the appeal.

1842.

SHIRLEY v. Earl FERRERS.

April 16.
Dec. 9.

EARL *FERRERS* being entitled in fee simple to considerable real estates in *Leicestershire* and elsewhere, made his will, dated the 12th of *April* 1827, by which, amongst other things, he devised his *Leicestershire* estates to the use of certain trustees for a term of 500 years, and, subject thereto, to the use of other trustees, during the life of *Caroline Shirley*, then an infant of the age of eight years, the reputed daughter of his late son *Robert Viscount Tamworth*, on trust to preserve contingent remainders, with remainder as to all the said estates (except certain portions) to the use of the sons and daughters of the said *Caroline Shirley* successively in tail, with divers remainders over, and ultimately to the use of the testator's right heirs; and, as to the excepted portions, to the use of the daughters of *Caroline Shirley*, (other than the eldest who under the previous limitations should become entitled to the other *Leicestershire* estates) as tenants in common in fee, with cross limitations between such daughters, in the event of any of them dying under twenty-one and unmarried; and in case there should be no such daughter who should attain twenty-one or marry under that age, then to the same uses as were before limited of the rest of the *Leicestershire* estates.

A testator devised certain estates to the use of trustees for the term of 500 years, and, subject thereto, to the use of other trustees, to preserve contingent remainders, with remainder to the first and other sons of *C. S.* (then an infant), with divers remainders over, and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estates as they should think fit (not exceeding in any one year a certain amount), in aid of another fund, to the maintenance

The

and education of *C. S.*, until she should attain twenty-one or marry, and that they should accumulate the surplus rents and profits for the benefit of *C. S.* when she should attain twenty-one or marry, and if she should die under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should, during her lifetime, pay the surplus rents, after payment of the annuities, to her for her separate use.

Held, that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of *C. S.* until her marriage were not liable to legacy duty.

1842.

SHIRLEY,

v.

Earl
FERRERS.

The testator then directed the trustees of the term of 500 years, out of the rents and profits of the said estates, to pay and satisfy certain annuities, and, until *Caroline Shirley* should attain twenty-one or marry under that age, to keep the testator's mansion-house at *Radcliffe-upon-Wreke* in repair, and also to pay the rent, rates, taxes, and other outgoings of his other mansion-house at *Craven Hill* (which was leasehold); and, in aid of the funds thereafter provided for the like purpose, to apply so much of the rents and profits of the said estates, not exceeding in the whole in any one year (including the rent, taxes, and other outgoings of the house at *Craven Hill*) the sum of 2000*l.*, as the trustees should in their discretion think fit, in the clothing, maintenance, and education of the said *Caroline Shirley*, fitting and suitable to the fortune she would possess; and to invest, and accumulate the interest of, the surplus rents of the said estates, after answering the purposes aforesaid, until she should attain twenty-one or marry under that age; and upon the happening of either of those events, to stand possessed of the accumulations and the securities on which the same should then be invested, upon such trusts and for such purposes as she should by deed or will appoint; and in default of such appointment, in trust for her absolutely; provided always, that if she should die under twenty-one and without having been married, the trustees were to stand possessed of the accumulations so to be made, and the securities on which the same should be invested, on trusts corresponding as nearly as might be to the uses before limited of the *Leicestershire* estates, except those of the term of 500 years. And after *Caroline Shirley* should have attained twenty-one or married, the same trustees were during her lifetime to pay the surplus rents after answering the said annuities, to her, for her separate use.

In

In a subsequent part of his will, after devising certain real estates in *Staffordshire* in trust for sale, and directing the proceeds, together with his residuary personal estate, to be accumulated for the benefit of *Caroline Shirley* when she should attain twenty-one or marry under that age, with a like limitation over as before mentioned, in the event of her dying under that age unmarried, the testator devised other freehold and copyhold estates to other trustees, upon trust for the said *Caroline Shirley*, when she should attain twenty-one or marry under that age, in fee; with a direction to the said trustees in the meantime, until she attained twenty-one or married, to pay and apply the rents and profits of those estates to her maintenance and education, as they should think fit.

1842.

 SHIRLEY
 v.
 Earl
 FERRERS.

The testator died shortly after the date of his will; and after his death this suit was instituted for the purpose of administering the trusts of his will, and making *Miss Shirley* a ward of the Court.

On the 26th of *August* 1837, *Miss Shirley*, being then eighteen years of age, intermarried with *Don Lorenzo, Duke Sforza Cesarini*.

After all other legacy duties which became payable under the will had been duly paid, a claim was made on the part of Crown, for payment of legacy duty at the rate of 10 per cent., upon the amount of the rents and profits which had been annually applied under the trusts of the term, to the maintenance and education of *Miss Shirley* previously to her marriage, and also upon the accumulations of the surplus rents during the same period, on the ground that those rents and profits and accumulations were in the nature of an annuity or legacy

1842.

SHIRLEY

v.

Earl

FERRERS.

gacy (*a*) charged upon the testator's real estates. That claim having been resisted by the executors, the commissioners of Stamps and Taxes, with a view to bring the question to an issue, put a stop upon the dividends of a sum in Court, constituting part of the testator's residuary estate, to the income of which the Duchess was intitled for life, under the settlement made on her marriage, to her separate use.

The Duchess, thereupon, presented a petition praying a declaration that legacy duty did not attach upon the rents in question, and that the stop might accordingly be removed.

The petition now came on to be heard before the Lord Chancellor, all parties consenting to be bound by his Lordship's decision. The argument was confined to the amount of the rents which had been applied to the maintenance and education of the petitioner, there having been, in fact, no surplus to accumulate.

Mr. *Purvis* and Mr. *Bagshawe*, for the petitioner, and Mr. *Bethell* and Mr. *Stinton*, for the Duke, who was interested in the fund under the marriage settlement, contended that a trust of this kind, for the maintenance of an infant out of the rents and profits of real estate, of

(*a*) The enactments upon which the claim was founded are contained in the third part of the schedule to the 55 G. 3. c. 184., in which, after imposing certain duties upon every legacy of the amount of 20*l.* or upwards, given out of the testator's personal estate, or out of or charged upon his real or heritable estate, or out of any monies to

arise by sale, mortgage, or other disposal of his real or heritable estate, or any part thereof, it is declared that all gifts of annuities or by way of annuity, or of any other partial benefit or interest out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of that schedule.

1842.

SHIRLEY
v.
Earl
FERRERS.

of which, subject to the trust, she was herself tenant for life, was merely a qualified form of ownership or enjoyment of the land itself, and not a "partial benefit or interest *out of*" the land, and that the intention of the act was, to impose a duty upon those gifts only which were purely pecuniary, and which were charged upon land devised to another person. *The Attorney-General v. Jackson (a)* and *Pickard v. The Attorney-General (b)*, were both cases of that kind, and, in that respect, clearly distinguishable from the present.

Mr. Elderton, appeared for the trustees.

Mr. Twiss and Mr. Romilly, for the Crown, contended that it was immaterial whether the trust was, to apply a certain sum out of the rents and profits, or a certain portion of the rents and profits themselves: the expressions were of equivalent import, and either of them amounted to a gift, "by way of annuity," of a certain sum out of the income of the estate, or, at all events, to "a partial benefit or interest out of the estate." The cases cited on the other side shewed that if the allowance for maintenance, under the trusts of the term, had stood alone and uncoupled with a collateral interest in the land, under other parts of the will, it would have been liable to legacy duty. But if that were so, what amount, it might be asked, of such collateral interest in the land was sufficient to take away the right of the Crown? would the devise of a single farm or even of a single acre be enough?

The LORD CHANCELLOR, (without hearing a reply).

The effect of the will is to give the petitioner a life estate subject to certain charges, and coupled with a direction

(a) 2 Cr. & J. 101.

(b) 6 Mcc. & Wels. 348.

1842.

SHIRLEY
v.
Earl
FERRERS.

direction to the trustees to apply a limited portion of the rents to her maintenance and education until she attain the age of twenty-one or marry. The direction merely does what this Court would have done without it. The petitioner would have been entitled at all events to maintenance out of the rents and profits of the real estates. It is true, the trustees have a discretion to allow a portion of the rents, not exceeding a certain amount, for that purpose: but still the estate out of which the allowance is to come is her estate. Nothing but what is a charge upon the estate of another person will come within the statute. It is very important that, as far as possible, we should avoid refinements in the construction of this act. I am of opinion that no legacy duty is payable, and the stop must be taken off.

Dec. 12.

BESCH v. FRÖLICH.

On a bill to dissolve a partnership, on the ground of the lunacy of a partner, the Court will not make its decree retrospective, even to the filing of the bill, still less to the time when the Defendant first became incapable of attending to the business.

ON the 9th of *December*, 1824, the Plaintiff and Defendant entered into partnership in the business of tailors, for a term of twenty-one years, subject to be determined, at the option of either party, at the expiration of fourteen years. The capital, consisting of 1000*l.* was contributed in equal moieties, and the deed of co-partnership contained the usual covenant by both parties, that they would respectively at all times, during the continuance of the partnership, employ themselves diligently in promoting the interests of the concern; in addition to which there was a special covenant by the Plaintiff (who had, for some years previous to the formation of the partnership, acted as foreman to the Defendant's father in the same trade) that he would wholly and exclusively devote his time and attention to the business,

business, and use his best endeavours to promote the prosperity of the same for the benefit of himself and the Defendant.

1842.

 BESCH
 v.
 FROLICH.

In the month of *November* 1837, a commission of lunacy issued against the Defendant, under which he was found to have been of unsound mind, and incapable of managing his affairs, from the 28th of *October* 1834: whereupon the Plaintiff, in the month of *December* 1837, filed his bill, stating that the Defendant had since the spring of the year 1834, in consequence of his malady, absented himself from, and taken no part in the management of the business, and praying that the partnership might be declared to have been dissolved, as from that time.

A formal answer was put in by the Committee of the lunatic, submitting his rights to the protection of the Court, and the Plaintiff went into evidence as to the time at which the Defendant had become incapable of attending to the business.

The cause was heard as a short cause before the Vice-Chancellor of *England* on the 24th of *May* 1839, when his Honor, by his decree, amongst other things, declared the partnership dissolved from the 1st of *May* 1834, from which time it was proved by evidence in the cause that the Defendant had, by reason of his unsoundness of mind, been unable to attend to or assist in the partnership business.

In the month of *December*, 1841, when considerable progress had been made in taking the accounts under that decree, an appeal, against the above-mentioned part of it, was presented, on behalf of the Defendant, under the sanction of the Lord Chancellor in lunacy.

The

1842.

BESCH

v.

FROLICH.

The appeal now came on to be heard.

Mr. *Swanston* and Mr. *Tennant*, for the Appellant.

The Court will not make a retrospective decree for a dissolution of partnership on the ground of lunacy; for the lunacy of a partner is not, *ipso facto*, a dissolution of the partnership, as bankruptcy is, but only a ground for applying to a court of equity to determine the contract, on the ground that one of the parties has become unable to fulfil it. *Huddleston's Case* (a), *Sayer v. Bennett* (b), *Jones v. Noy* (c); and as it is the decree of the Court which dissolves the partnership, the date of the dissolution ought to be the date of the decree. It is true, that in *Kirby v. Carr* (d), which will perhaps be relied on by the other side, a partnership was, under similar circumstances, declared to have been dissolved as from the filing of the bill: but the point does not appear to have been argued, and the decree was probably not opposed.

Mr. *Stuart* and Mr. *Bacon*, for the Respondent.

It is immaterial whether the lunacy of a partner is or is not *ipso facto* a dissolution of the partnership, for if it incapacitates one of the partners for the performance of his part of the contract, this Court, which acts on the assumption that what ought to have been done has been actually done, will decree a dissolution from the time when the incapacity commenced.

[*The LORD CHANCELLOR.* How can that be? Suppose the Plaintiff became insolvent. The lunatic would be bound, notwithstanding this retrospective decree, to pay the partnership debts contracted during the time that

(a) 1 *Swanst.* 514. n. Cited
2 *Ves.* sen. 35.,
(b) 1 *Cor.* 107.; see p. 110.

(c) 2 *Myl. & K.* 125.
(d) 5 *Y. & C.* 184.

that the business continued to be carried on in the joint names. Besides it must be remembered that there are three considerations between partners. The share of each in the capital; the share of each in the good will; and the labour which each undertakes to devote to the business. Your argument is, that because one of these considerations — and that, perhaps, the least valuable of the three — fails, you are entitled from that time to take to yourself the whole benefit of the other two; and that too, while your partner remains jointly liable for the debts of the partnership during the intermediate period. How can that be right? it would be contrary to all principles of justice.]

1842.

 BESCH
 v.
 FROLICH.

A different rule would operate injuriously to the lunatic partners themselves, for it would induce their co-partners to come for a dissolution on the first symptom of derangement, without waiting to see whether the incapacity was any thing more than temporary.

[*The* LORD CHANCELLOR. If such a case should occur, and there were any doubt as to the nature of the malady, the Court might direct an enquiry upon that point, as appears to have been done in *Sayer v. Bennett*.]

If the Court has a discretion in fixing the time of the dissolution, it is a material circumstance in this case that the bill was filed immediately on the Defendant's being found lunatic by inquisition, and also, that the decree was never complained of until the accounts had been gone into, and it had been ascertained that a later dissolution would be more for the Defendant's benefit.

The LORD CHANCELLOR, (without waiting for a reply.)

Whatever delay has occurred is imputable to the Plaintiff himself; it was competent to him to have filed his

1842.

BESCH

v.

FROLICH.

his bill at any moment since the time when his partner first became incapable of attending to the business: but he chose to lie by for several years, and having during that time had the benefit of his partner's share of the capital and good will, he cannot now say that the partnership is to be dissolved as from the time when the insanity commenced: for, what a hardship it would be if the Plaintiff were to take all the profits which have since accrued from the Defendant's share of the partnership property, while the Defendant remained, during all that time, liable to the losses.

Upon the other question, whether the dissolution ought to be from the filing of the bill or from the date of the decree, I have felt some doubt, but upon consideration I think it ought to be from the date of the decree — that is, of the decree below. As between the partners themselves, indeed, there is no reason why it should not be from the filing of the bill; but as regards third parties, the dissolution does not take place until it is declared by the Court; and therefore the hardship and inconvenience of a retrospective dissolution, to which I have already adverted, would apply to that interval as well as to the interval between the commencement of the insanity and the filing of the bill. I think, therefore, that the partnership must be declared to have been dissolved as from the date of the Vice-Chancellor's decree, and that the decree must be varied accordingly.

1842.

HODSON v. BALL.

May 9.
Dec. 22.

JOHN HODSON, the testator in the cause, by his will devised and bequeathed all his real and personal estate, after payment of his debts, to his wife *Elizabeth Hodson*, and *John Ball* and *Robert Richardson*, upon trust to pay an annuity of 30*l.* to his wife during her life, and to divide the remainder of the income equally among his children who should survive him, and the lawful issue of such as should be dead at the time of his decease: and he directed that his wife should be the sole guardian of his children, and have the sole management of his estate, and receive and collect the rents and profits thereof, in order to save, as much as possible, his other trustees the trouble of so doing; but he also directed that the other trustees should annually investigate the widow's accounts, for the satisfaction of all parties concerned.

The testator died in the year 1815, leaving a numerous family, and his will was shortly afterwards proved by his widow and the two other executors therein named. The widow died in the year 1832, and in the year 1835 the original bill in this cause was filed by one of the testator's sons against *Ball* and *Richardson*, and the personal representative of the widow, and other parties, in which, after stating that all the three exe-

cutors

The province of a supplemental bill in aid of a decree is merely to carry out and give fuller effect to that decree, and not to obtain relief of a different kind, and on a different principle; the latter being the province of a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of the Court. And therefore, where, in a suit for the execution of the trusts of a will, the original bill had prayed, and the decree had directed, merely the common accounts against the executors, and the Plaintiff afterwards

filed a supplemental bill, without the leave of the Court, alleging that in taking the accounts in the Master's office he had discovered for the first time that the executors had been guilty of misconduct, and praying relief against them in respect of their wilful neglect and default; the supplemental bill was ordered to be taken off the file for irregularity.

Where a bill, which was in part a supplemental bill in the nature of a bill of review and in part a bill of revivor, had been filed without leave of the Court; the whole was ordered to be taken off the file, although, as a mere bill of revivor, it would have been regularly filed without leave.

1842.


HODSON
v.
BALL.

cutors had, in the month of *February* 1816, proved the will and undertaken the trusts thereof, and that the widow had with the knowledge and concurrence of her co-trustees, entered into the possession of the testator's personal estate, and into the receipt of the rents and profits of his real estate, it was alleged that she had during her lifetime wasted and misapplied the assets; but the bill contained no charge of default against the other executors, and it prayed merely the usual account of their receipts and payments, in respect of the testator's estate, since the decease of the widow, with the usual account, against her representative, of what was due from her to the estate at the time of her death. And at the hearing, in the year 1839, a decree was made accordingly.

The Defendant *Richardson* having afterwards died, it became necessary to revive the suit against his personal representative; but instead of filing an ordinary bill of revivor for that purpose, the Plaintiff, in the month of *July* 1841, filed a bill of revivor and supplement against the personal representatives of *Richardson* and the surviving parties to the original suit, charging, by way of supplement, that since the accounts of the executors had been brought into the Master's office, the Plaintiff had for the first time discovered that *Ball* and *Richardson* had, as well during the lifetime of *Elizabeth Hodson* as since her decease, repeatedly interfered and acted in the trusts of the will and in the management of the trust estate, and were privy to and cognizant of all her dealings in relation thereto; and further charging, that in taking the accounts before the Master, it appeared, as the fact was, that *Ball* and *Richardson* had connived at the widow's misappropriation of the trust property, and had been guilty of great negligence in the investigation of her accounts, having signed them on three occasions only

only during her lifetime ; but that, by reason of the defective nature and frame of the decree in the original suit, it was not competent for the Plaintiff to charge the Defendant *Ball* and the executors of *Richardson*, as they ought to be charged, with the loss which the trust estate had sustained through their misconduct: and after the usual prayer of revivor against the personal representative of *Richardson*, the bill prayed, amongst other things, that *Ball* and the estate of *Richardson* might be declared liable for, and be charged with, such sums as, but for their wilful neglect and default, might have been received by them in respect of the trust estate, either during the lifetime of *Elizabeth Hodson* or since her death.

1842.
HODSON
v.
BALL.

That bill having been filed without the leave of the Court, the Defendant *Ball* moved, before the Vice-Chancellor of *England*, that it might be taken off the file for irregularity, and his Honor made an order accordingly.

The Plaintiff now moved, by way of appeal before the Lord Chancellor, to discharge that order.

Mr. *Wakefield* and Mr. *Mylne*, appeared in support of the motion.

Mr. *Richards* and Mr. *Phillips*, *contra*.

The several points raised in the argument, and the authorities cited, on both sides, are fully discussed in the judgment.

The LORD CHANCELLOR.

Dec. 22.

This was a motion to discharge an order of the Vice-Chancellor, by which he directed a supplemental bill to

N 2

be

1842.

HODSON

v.


BALL.

be taken off the file, on the ground that he considered it to be a supplemental bill in the nature of a bill of review, and that it had been filed without the permission of the Court.

The original bill was, as far as related to three of the Defendants, a bill calling on them, as executors and trustees, to account; and an account was decreed against them in the common form. The supplemental bill stated, that after the decree had been carried into the Master's office, it was discovered, for the first time, that the trustees had greatly misconducted themselves in the management of the affairs of the trust, and it accordingly prayed, that they might account for what, except for their wilful neglect and default, might have come to their hands. So that the decree prayed for by the supplemental bill was essentially different from the decree pronounced by the Vice-Chancellor upon the original bill.

On this ground it was insisted that the bill ought to be taken off the file, it having been filed without the permission of the Court. In answer to that it was said that the bill was not a supplemental bill in the nature of a bill of review, but a supplemental bill in aid of a decree; and a passage from *Mitford's Treatise on Pleading* was referred to, in which it is stated that a supplemental bill may be filed in aid of a decree, in order that it may be carried fully into execution. (a) Now there is no doubt of the correctness of that position, but the question is, what is the province of a supplemental bill in aid of a decree? I apprehend that a supplemental bill in aid of a decree cannot vary the principle of the decree. Its province is, to carry out the principle of the decree; to give full and complete effect

(a) *P.* 62. 4th ed.


1842.

 HODSON
 v.
 BALL.

fect to the decree, as it exists. The instance that is generally given of a supplemental bill in aid of a decree is of this description — where there has been a decree to account, but directions have not been sufficiently given as to the manner of accounting, and a further decree is therefore required for the purpose of supplying this defect, that is, of carrying into full effect the original decree. In the case that was cited, of *Dormer v. Fortescue* (a), Lord *Hardwicke* states, what seems to be the foundation of the passage in *Mitford*, “that supplemental bills are often brought even in aid of a decree of this Court;” and he illustrates that by the case to which I have referred, for he says “as in a decree to account for want of full directions before (b),” and the very case of *Dormer v. Fortescue* seems to be a case of that description, because, there, the original decree had established the title, but there was a doubt, whether the Court would be justified in founding on that decree and on the existing record, an order that the party should account for the rents and profits from the time when the title of the Plaintiff had accrued; and, for the purpose of supplying that supposed omission, the supplemental bill was filed. Lord *Hardwicke* was of opinion that the proceedings were sufficient, but supposing, he said, that they were not, the supplemental bill had rendered them sufficient. Now that was strictly a supplemental bill for the purpose of carrying out and accomplishing the original decree, and the object of it, not for the purpose of varying the principle of the decree: and therefore, I apprehend, the distinction is that which I have stated — that a supplemental bill in aid of a decree is not a supplemental bill that seeks to vary the principle of the decree, but one which takes the principle of the decree as the basis and seeks merely to

(a) 3 *Atk.* 124.

(b) *Ibid.* p. 133.

1842.


HODSON
v.
BALL.

to supply any omission which there may be in the decree, or in the proceedings, so as to enable the Court to give full effect to its decision.

Now the decree prayed for in this case is quite contrary to the principle of the original decree. The original decree was merely for a common account. The supplemental bill prays for an account of quite a different nature and character, founded on the wrongful conduct of the parties; for it calls upon them to account, not for what they have received or what has come to their hands, or to the hands of others for their use, but for what they might have received, had it not been for their wilful default. This therefore cannot be considered as a supplemental bill in aid of a decree, because it proceeds upon a principle quite different from that of the original decree. It does not seek to carry out that decree; it is not in furtherance of that decree, but for the accomplishment of quite a different object; and I think the Plaintiff himself has pronounced his own opinion of the nature of the bill upon the very face of the bill itself, for he has introduced an averment, that the supplemental matter has been discovered since the original decree was pronounced—an averment which is necessary for the purpose of supporting a supplemental bill in the nature of a bill of review, but which is not required in a supplemental bill in aid of a decree. On this point, therefore, I am of opinion, that the objection to the Vice-Chancellor's order cannot be sustained.

The next point taken was a point of form, namely, whether or not the bill ought to be taken off the file. It was stated by Mr. *Wakefield* that that, in point of practice, was not a proper course of proceeding. Now, consider this on principle and on authority. A bill has
been

been put upon the file contrary to the practice of the Court. It is an improper proceeding, it has been improperly put upon the file. What is a more just, natural, or proper remedy than to take it off the file? Then as to authority, there is a case (*Milligan v. Mitchell* (a) I think), in which the Court had made an order, allowing an amendment of the bill by adding parties. Instead of amending in that way, by merely adding parties, other amendments were added, and the bill, with these amendments, was put upon the file. What did Lord *Cottenham* do? He ordered the bill to be taken off the file. That was one of the cases cited at the bar of an analogous description to the present; it was not, indeed, a supplemental bill, but it was a proceeding improperly put upon the file without the permission of the Court, and the Court applied this remedy. So, in another case that was mentioned, of *Perry v. Phelps* (b), Lord *Eldon* seemed to consider that the proper course of proceeding was to take the bill off the file. But then it is said that, in giving that opinion, he referred to the case of *Young v. Keighly*, and that when you look at the Report of *Young v. Keighly*, the passage to which he referred, is not to be found in the Report, and it is therefore suggested that he was under some misapprehension in that respect. But suppose it was so, the passage in *Perry v. Phelps* shews, at least, Lord *Eldon's* opinion, that that was the proper course of proceeding; and he thought that course had been adopted in the previous case of *Young v. Keighly*: perhaps he made some mistake in the name of the case. However, that authority is sufficient to shew what was Lord *Eldon's* opinion as to the practice. Then came the

1842.

HODSON
v.
BALL.

(a) 1 *Myl. & Cr.* 433.; see p. 447. (b) 17 *Ves.* 175.; see p. 184.

1842.

HODSON

v.

BALL.

the case before me, of *Partridge v. Usborne* (a), which was argued at great length, and in which a great many important points were agitated; but it never occurred to any of the gentlemen at the bar who argued that case—men of great experience—to take any objection to the course, proposed to be adopted, of taking the bill off the file. So that I apprehend, upon principle and upon the authorities to which I have referred, the proper course of proceeding, in a case like this, is to order the bill to be taken off the file.

But then Mr. *Wakefield*, who is full of resources, had another objection. He said that this was not merely a supplemental bill in the nature of a bill of review, or a supplemental bill in aid of a decree, but that it was also a bill of revivor; and that, being properly on the file as a bill of revivor, it could not be taken off; but I think the answer given to that by the Vice-Chancellor was the proper answer, “If you have chosen to mix together two bills for these two different objects, and if they cannot be detached and separated the one from the other, and one is improperly on the file, the whole must follow the fate of that which is improperly on the file.”

For these reasons, therefore, I am of opinion that the order of the Vice-Chancellor was right, and that this motion must be refused with costs.

(a) 5 *Russ.* 195.

1841.

MITFORD v. REYNOLDS.

1841.
Nov. 18, 19, 20.

1842.
Dec. 8. 20.

ROBERT MITFORD, the testator in this cause, had been for thirty years of his life in the civil service of the *East India Company*, during the greater part of which time he had resided at *Dacca*, in the presidency of *Bengal*. In the year 1828 he returned to this country, and was domiciled here at the time of his death, which took place in the year 1836. Being possessed of a very large personal estate, he made his will, dated the 21st of *July* 1835, which commenced in these words:—“The will last made by me was destroyed in consequence of circumstances that occurred in my family which have totally changed the nature of the relations as they had previously subsisted, and, by a necessary result, any disposition towards the parties in the respect of their succession to the property, real and personal, of which I may be found to be possessed at my death, after the payment of all my just debts, necessary expenses, funeral charges, &c.” The testator then

A testator, in disposing of “the property of which he should be possessed at his death after payment of debts and expenses,” made several specific and pecuniary bequests, and then directed his executors, amongst other things, to purchase and prepare for the ultimate deposit of his own body, and for the removal and deposit of the remains of his parents and sister then lying interred in a certain

proceeded

churchyard, a certain piece of unconsecrated ground then belonging to another person, on which they were “to build a suitable, handsome, and durable monument, the expense to be met and provided from the surplus property that should remain after payment of the above legacies and bequests, &c.” After which he gave “the remainder of his property to the government of *Bengal*, to be applied to charitable, beneficial, and public works, at and in the city of *Dacca* in *Bengal*, for the exclusive benefit of the native inhabitants, in such manner as they and the government might regard as most conducive to that end.”

Held, first, that the direction as to the monument was not a charge upon the residue, but a bequest of such integral part of the residue as would be necessary for carrying the direction into effect. Secondly, that even supposing that direction to be void, it did not invalidate the subsequent bequest to the government of *Bengal*, if otherwise valid, inasmuch as the sum necessary for carrying the direction as to the monument into effect was capable of being ascertained. Thirdly, that the bequest to the government of *Bengal* was a good charitable bequest.

Whether the direction as to the monument is void, *quære*?

1841.

MITFORD

v.


REYNOLDS.

proceeded to make several specific and pecuniary bequests, after which he proceeded as follows : —

“ 8thly, In the event of my demise at any early period, I direct and enjoin the executors and administrators hereunto, to purchase and prepare for the ultimate deposit of my body, and also for the removal and deposit of the remains of my parents and sister, now lying interred in a vault in the churchyard of *Chipping Ongar*, in *Essex*, the mount that is contiguous, surrounded by a moat, which I understand to be the property at present of Mr. *Evans*, on the summit of which they will be pleased to cause the construction of a suitable and handsome as well as durable monument, fronting the summit and sides of the mount with cedar and cypress trees, in a manner that may render it ornamental to the town, the expenses whereof for the purchase, the construction of the monument, &c., are to be met and provided from the surplus property that will and may be found after the payment of, and discharge shall have been made of the above legacies and bequests, &c. And though aware that the *Monument Mount* may not be consecrated, I yet direct and expressly will and command, that this injunction for the place of final interment be absolutely attended to, and carried into instant effect and completion.”

“ 9thly, I will, devise, give, and bequeath the remainder of my property, of whatsoever kind and description, and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses, (which I will and direct be preserved as pensioners, and never, under any plea or pretence, to be used, rode, or driven, or applied to labour,) to the government of *Bengal*, for the express purpose of that government applying the amount to charitable,

charitable, beneficial, and public works at and in the city of *Dacca* in *Bengal*, the intent of such bequest and direction being, that the amount shall be applied exclusively to the benefit of the native inhabitants, in the manner they and the government may regard to be most conducive to that end." In a subsequent part of his will the testator appointed *Henry Revell Reynolds*, jun., and *Joseph William Thrupp*, his executors.

1841.

 MITFORD
 v.
 REYNOLDS.

Shortly after the testator's death the bill was filed by his widow (partly, as a creditor against his estate under the trusts of her marriage settlement and of a separation deed which he had executed shortly before his death, and partly, as claiming an interest in the residue, which, she contended, was ineffectually disposed of by the above recited clauses of the will) against the executors of the will, the trustees of the settlement and separation deed, *John Mitford* and *Anne*, the wife of *Henry Revell Reynolds* the elder (who were alleged to be the testator's only next of kin at the time of his death), the *East India Company*, and the Attorney-General. The bill prayed, amongst other things, a declaration that the bequest contained in the ninth clause of the will was void, and also a declaration that the directions contained in the eighth clause respecting the monument, were illegal and of no effect.

By the decree made on the hearing of the cause before the Vice-Chancellor of *England*, on the 8th of *June* 1838, it was, amongst other things, declared "that the bequest of the residue, in the testator's will contained, was a good and valid bequest for the charitable purposes therein mentioned," and it was referred to the Master to make the usual inquiries as to the next of kin of the testator living at the time of his death, and if the Master should find that such next of kin, or the representatives

1841.

MITFORD
v.
REYNOLDS.

representatives of such of them, if any, as were dead, were parties to the suit, he was then to proceed to take the usual accounts of the testator's estate.

The Plaintiff appealed against so much of that decree as declared the validity of the bequest to the government of *Bengal*, and the appeal came on to be heard before Lord *Cottenham* C. on the 21st of *July* 1839; but his Lordship refused to decide the question raised by the appeal, until the inquiries and accounts directed by the decree should have been taken, and the existence of a residue ascertained. In the meantime, however, he directed a further reference to the Master to inquire who was meant by the testator by the description in his will of "the government of *Bengal*?"

The Master, by a separate report, dated the 10th of *December* 1839, found that by the government of *Bengal*, the testator intended to designate the executive government of *Fort William* in *Bengal*, as it existed under the provisions of the 3 & 4 *W. 4. c. 85.*, at the date of his will, and that such government was then and had ever since been vested in the Governor-General of *India* alone. In consequence of that report, the Earl of *Auckland*, the then Governor-General of *India*, was made a party to the suit by amendment; and the Master having afterwards made his general report, from which it appeared that testator's next of kin were before the Court, and that there was a considerable residue,

The appeal now came on again, to be heard.

Mr. *Bethell*, Mr. *Russell*, and Mr. *Heathfield*, appeared for the Plaintiff.

Mr. *Wakefield*, Mr. *Turner*, Mr. *Ellison*, and Mr. *Jemmett*, for the next of kin.

Mr.

Mr. *Richards*, Mr. *Lloyd*, and Mr. *Wigram*, for the
East India Company and the Earl of *Auckland*.

1841.
MITFORD
v.
REYNOLDS.

Mr. *Twiss* and Mr. *Wray*, for the Attorney-General.

Mr. *Koe* and Mr. *Roupell*, for the executors.

All the points raised in the argument are noticed and
fully discussed by the Lord Chancellor in his judg-
ment.

The cases cited were the following : —

Howse v. Chapman (a), *Townley v. Bedwell* (b), *Chap-
man v. Brown* (c), *Moggridge v. Thackwell* (d), *Morice
v. Bishop of Durham* (e), *Attorney-General v. Davies* (g),
Vezey v. Jamson (h), *Attorney-General v. Comber* (i),
Attorney-General v. Heelis (k), *British Museum v.
White* (l), *Powell v. Attorney-General* (m), *James v.
Allen* (n), *Attorney-General v. Hinxman* (o), *Ommaney v.
Butcher* (p), *Baker v. Sutton* (q), *Fowler v. Garlike* (r),
Knight v. Knight (s), *Mellick v. Asylum* (t), *Provost of
Edinburgh v. Aubery* (u), *Williams v. Jones* (v), *Attorney-
General v. Lepine* (w), *Emery v. Hill* (x), *Attorney-Ge-
neral v. Stephens* (y), *De Themmines v. De Bonneval* (z),
Doe

- (a) 4 *Ves.* 542.
- (b) 6 *Ves.* 194.
- (c) *Ibid.* 404.
- (d) 7 *Ves.* 36.; see 50. note.
- (e) 9 *Ves.* 599., 10 *Ves.* 522.
- (g) *Ibid.* 535.
- (h) 1 *S. & S.* 69.
- (i) 2 *S. & S.* 93.
- (k) *Ibid.* 67.
- (l) *Ibid.* 594.
- (m) 3 *Mer.* 48.
- (n) *Ibid.* 17.

- (o) 2 *J. & W.* 270.
- (p) *T. & R.* 260.
- (q) 1 *Keen*, 224.
- (r) 1 *R. & M.* 232.
- (s) 3 *Beav.* 148.
- (t) *Jac.* 180.
- (u) *Amb.* 236.
- (v) *Ibid.* 651.
- (w) 2 *Swanst.* 181.
- (x) 1 *Russ.* 112.
- (y) 3 *Myl. & K.* 347.
- (z) 5 *Russ.* 288.

1842.

Mitford
v.
Reynolds.

Doe v. Pitcher (a), Attorney-General v. Earl of Lonsdale (b), Williams v. Kershaw (c), Mayor of Lyons v. East India Company (d), Ellis v. Selby. (e)

1842.

Dec. 8.

The LORD CHANCELLOR.

This is a question arising out of the will of *Robert Mitford*. The testator, after providing for the payment of his debts and legacies, proceeds as follows:—"Ninthly, I will, devise, give, and bequeath the remainder of my property to the government of *Bengal*, for the express purpose of that government applying the amount to charitable, beneficial, and public works at and in the city of *Dacca* in *Bengal*, the intent of such bequest and donation being that the amount shall be applied exclusively to the benefit of the native inhabitants in the manner they and the government may regard to be most conducive to that end."

The first and main question is, whether this is a valid charitable bequest. The money is to be applied to charitable, beneficial, and public works at and in the city of *Dacca* in *Bengal*. If these words, as it is contended upon the authority of *Williams v. Kershaw (c)*, are to be taken distributively and not conjunctively, and any one of the purposes or of the alternatives would not constitute a valid charitable bequest, the whole disposition will, of course, fail. Upon that point no doubt can be entertained. But this is not the whole of the bequest, because the testator goes on to say that it is his intent that the money shall be applied exclusively to the benefit of the native inhabitants of *Dacca*. Taking, therefore,

(a) 6 *Taunt.* 359.


(b) 1 *Sim.* 105.

(c) 5 *L. Journ. N. S.* 84.; and
see 1 *Keen*, 232. n.

(d) 1 *Moore's P. C. Cas.* 175.

(e) 1 *Myl. & Cr.* 286.

therefore, the whole together, the meaning, as I understand it, is this, that the money shall be applied to works—by which I understand something to be constructed or established—for the benefit of the native inhabitants of *Dacca*—not for any particular class of the native inhabitants, but for all the native inhabitants in general, both rich and poor—and I think within all the authorities, this constitutes a valid charitable bequest.

1842.

 MITFORD
 v.
 REYNOLDS.

In the case of *Jones v. Williams (a)*, which was before Lord Camden, there was a bequest of 1000*l.* to supply water to the town of *Chepstow* for the use of the inhabitants. That was considered a charitable bequest within the statute of *Elizabeth*; and Lord Camden, upon that occasion, stated that a gift for general or public use, for the poor as well as the rich, had always been considered within the statute of *Elizabeth*, as a good charitable bequest. Again, in a case which was cited at the bar, of *Howse v. Chapman (b)*, Lord Loughborough decided that a gift for the improvement of the city of *Bath* was, from its general nature, a good charitable bequest. And in another case which was also referred to, the case of the *Botanical Garden at Stockwell (c)*, Lord Eldon thought that the testator's having added in his will, that he considered it would be a public benefit, gave to the bequest the character of charity, and consequently that the gift was void under the Statute of Mortmain. So, also, in the case of the *Attorney-General v. Heelis (d)*, which was a gift of funds for the improvement of the town of *Bolton*, that also, from its general nature, was considered as a valid charitable bequest, and the Vice-Chancellor, Sir John Leach, upon that occasion stated

(a) *Amb.* 651.

(b) 4 *Ves.* 542.

(c) *Townley v. Bedwell*, 6 *Ves.* 194.

(d) 2 *S. & S.* 67.

1842.

MITFORD
v.
REYNOLDS.

stated that he had always considered the rule to be that any lawful bequest for a general or public purpose was a good charitable bequest within the statute of *Elizabeth*, and he instanced the case of money given for the purpose of building a sessions house for the county, and other similar cases which had been considered from their general nature as good charitable bequests.

Now in this case, according to the construction which I put upon the words of this bequest taken altogether, it is a bequest of money to be applied in the construction or establishment of some works for the general benefit of the native inhabitants of *Dacca*, for the poor as well as for the rich ; and I think that comes within the principle of the cases I have stated, and constitutes, under the statute of *Elizabeth*, a good charitable bequest.

It is unnecessary for me to advert to the question as to the Statute of Mortmain, because I agree in what was stated in the case of *The Mayor of Lyons v. The East India Company (a)*, that the Statute of Mortmain does not apply to *India*. And this brings me, therefore, to the consideration of several other objections which have been made to this bequest. One is, that it is difficult to ascertain, and uncertain, what the testator meant by the term “native inhabitants of *Dacca*.” Now I apprehend that any person who has been in the habit of communicating with the *East Indies* would have no difficulty upon that subject. If there were any real difficulty, it might be removed by a reference for the purpose of inquiring as to the meaning of this term. But I apprehend that in the mouth of a person who has been in the habit of residing in the *East Indies* the term “native inhabitants of *Dacca*” is used in

(a) 1 *Moore's P. C. Cas.* 175.

in contradistinction to the *European* inhabitants, or the descendants of *European* inhabitants; and that, I conceive, was the sense in which the term was used by the testator in this instance.

1842.

 MITFORD
 v. -
 REYNOLDS.

Again it is said, how can any works be exclusively for the use of the native inhabitants? And the instance was given, I think by Mr. *Wakefield*, of a monument, which all persons would see and all persons would enjoy as far as it was capable of being enjoyed. But many instances might be put of works that might be applied exclusively to the benefit of the native inhabitants — hospitals for the benefit of the native inhabitants only — baths for the benefit of the native inhabitants only — gardens, and various other establishments might be suggested which would satisfy the words “for the exclusive benefit of the native inhabitants.”

Another objection which was made was this, that this fund might be applied to idolatrous purposes, to the building of a temple for the worshipping of idols, and other objectionable purposes. The answer to this, I think, is obvious. The gift is “for the benefit of the native inhabitants.” This Court would not consider such an application of the funds as being for the benefit of the native inhabitants, nor would any other Court, administered upon the principles of this Court, consider that an application of the fund for the purpose of encouraging idolatry could be for the benefit of the native inhabitants of *Dacca*; and I understand from the acts of parliament (a), by which the Supreme Court of *Calcutta* was founded, and from the proceedings in the case of the *Mayor of Lyons v. The East India Company*, that the Supreme Court of *Calcutta* exercises an equitable

(a) 13 G. 3. c. 63., 21 G. 3. c. 70.

1842.

MITFORD
v.
REYNOLDS.

able jurisdiction, similar to and corresponding with the equitable jurisdiction of this Court, including the jurisdiction exercised by this Court in matters of charity. Any application, therefore, of the funds for idolatrous purposes would not be considered by that Court as a proper application within the meaning of the testator, and would be controlled, regulated, and restrained. It appears to me, therefore, that the money in this case being, by the will of the testator, directed to be given for this purpose to the government of *Bengal*, which government of *Bengal* is found by the report of the Master to be the Governor-General of *India*, the money ought to be paid over to the Governor-General of *India*, as in the case of foreign charities, for the purpose of being applied to the purposes mentioned in the will.

But then it is said, this Court will not part with the fund, because it may lead to abuse, that the Governor-General may misapply this fund, may not discharge this trust in a manner of which this Court might approve, and that he is amenable to no tribunal, and subject to no control. This also, I apprehend, is incorrect. When you come to look at the statute, by which that Court is founded and regulated, it appears that the Governor-General is subject to the jurisdiction and control of the Supreme Court of *Calcutta*, except when he is acting entirely in his public capacity as Governor-General in council. Now, in this case, he is receiving the funds of a private individual, to be applied according to the will of that individual. He does not receive them for the purpose of discharging any duty, or any trust which is cast upon him by the public; he is not responsible to the government, or to her Majesty, or to the *East India* company, for the manner in which he discharges this trust; he is not acting as Governor-General in council; and, therefore, I appre-

I apprehend, he is amenable to the tribunal of the Supreme Court of *Calcutta*, precisely in the same way as if he was acting in any ordinary case as an individual.

1842.

 MITFORD
 v.
 REYNOLDS.

Another difficulty, however, was suggested, which was of this nature. This charity is to be administered for the benefit of the native inhabitants of *Dacca*, according to the opinion of the Governor-General and the native inhabitants, of what shall be for their benefit: and it is said, What are you to do if they differ as to the mode of distribution and application? In that case I think the answer is obvious. You could not apply the fund to any charitable object until they agreed, or until the Court, if the Court thought itself justified in doing so, should interfere for that purpose. But the same difficulty would exist in a great variety of cases. If property is given for a charitable object to *A.* and *B.*, to be applied to such charitable institutions in this metropolis as they shall agree upon, they may differ; but such a bequest was never considered on that account as not constituting a valid bequest. It appears to me, therefore, that these objections are objections that do not weigh in this case, and ought not to govern the decision of the Court.

But then there is another objection—an objection which was not presented to the consideration of the Vice-Chancellor when the case was argued before him; and that objection arises out of the eighth clause, which precedes that on which I have been commenting. The clause is in these terms. [His Lordship read the eighth clause, and proceeded—] Now it is argued that this is a void bequest; and that this being a void bequest, and the amount which it will be necessary to expend for the purpose of carrying this design into effect, if it could be legally carried into effect, being uncertain, and this

1842.

MITFORD
v.
REYNOLDS.

being to be paid out of the residue, and the remainder of the residue being to be applied to the charitable objects to which I have already adverted, that if the sum to be applied to this object is uncertain, the balance also must be made uncertain, and therefore that the ultimate residue applicable to the charitable purpose being uncertain, the gift would be void within the decision in *Chapman v. Brown* (a), and I think in the *Attorney-General v. Davies* (b), and in the more recent decision of *The Attorney-General v. Hinxman* (c). Now, assuming that this is a void bequest (I am aware that that is a matter which is controverted), it is payable out of the residue, because it is payable out of the surplus after the payment of debts and legacies; and I do not know what constitutes the residue, but the surplus after the payment of the debts and legacies. And it is remarkable that when you come to the other disposition it speaks of the remainder, that is, the remainder after all those previous objects have been satisfied, and, among others, this object as to the mausoleum or monument, which is to be paid, as I consider, out of the residue. Then the only question is this, is this so uncertain in its nature (assuming that it is a void bequest), so uncertain as to the amount that would be required for it, as to vitiate the bequest to the charity to which I have adverted?

Now, in the case of *Chapman v. Brown*, the Master of the Rolls, Sir *William Grant*, was very desirous, if possible, of preventing this consequence. That was a bequest for a chapel. He says, the chapel is not defined, the nature and size of it is not ascertained, and there is no locality appointed. If I knew where it was to


(a) 6 Ves. 404.


(c) 2 J. & W. 270.

(b) 9 Ves. 555.

to be built, I might form some opinion as to what would be required for the population of that district, and I might, under such circumstances, refer it to the Master for the purpose of ascertaining what sum would be sufficient for the purpose of satisfying this bequest. Now those difficulties which existed in the case of *Chapman v. Brown* have no existence, as it appears to me, in the present instance. The place is defined, the very spot is pointed out, and the extent required for the purchase. The monument is to contain the body of the testator, and the bodies of his two parents, and of his sister. The proper size of it, therefore, is easily ascertained. It is to be a suitable and handsome monument, and durable, that is, built of durable materials, and in a durable way. It does not appear to me, therefore, that there is in this case that difficulty which existed in the case of *Chapman v. Brown*, and which the Master of the Rolls there thought to be insurmountable, and which prevented him from referring it as a matter of inquiry to the Master. And it does not appear to me that there is in this case any difficulty, but that it may be referred to the Master for the purpose of ascertaining what would be a proper sum to carry that intention of the testator into effect. That sum, being once ascertained, would be deducted from the residue, which would render the amount applicable to the charitable object certain, and that would get rid of the objection which has been raised upon this ground.

It appears to me, taking all these matters into consideration, that this is a good charitable bequest, free from any valid or legal objection which can be urged against it, and that this Court ought ultimately to direct this money to be paid over to the Governor-General. But all this is premature. The Vice-Chancellor has merely declared it to be a valid charitable bequest, and

1842.

 MITFORD
 v.
 REYNOLDS.

1842.

 MITFORD
 v.
 REYNOLDS.

so far I am of opinion that the decree is right. I think, however, it will be necessary to vary it in one respect; namely, for the purpose of identifying what the charitable bequest is, to which the decree refers: because, if the direction as to the mausoleum, which is untouched by the decree, is to be considered as a charitable bequest — not a superstitious use, but a charitable bequest — then there are two charitable bequests contained in the will; and therefore that part of the decree of the Vice-Chancellor, in which he has declared “that the charitable bequest of the residue in the testator’s will contained is a valid charitable bequest,” should be varied so as to identify the charitable bequest to which he refers, namely, that which relates to the inhabitants of *Dacca*. That is the only alteration which it appears to me, at this moment, necessary to make in the decree.

Dec. 20.

The cause now coming on, by the Lord Chancellor’s permission, to be heard before his Lordship for further directions,

Mr. *Bethell*, for the Plaintiff, proposed that it should be referred to the Master to make the inquiry, suggested in the foregoing judgment, respecting the monument: whereupon

Mr. *Wigram*, on behalf of the *Dacca* charity, submitted that the Court should first decide whether the bequest for the monument was merely a charge upon the residue, or an appropriation of an integral part of the residue, and if it was merely a charge, then whether the bequest was valid; because, if it were held to be merely a charge on the residue, and invalid, the whole residue would belong to the *Dacca* charity, and the proposed inquiry would be useless; but

The

The LORD CHANCELLOR said,

I consider that I have already decided the first question. The expense of constructing the monument was to be defrayed out of the property which should remain after payment of the testator's debts and legacies : what is that but the residue ? Then, when he comes to the *Dacca* charity, he says, "I give the *remainder* of my property"—from which I understand, what remains of the residue after building the monument—"to the government of *Bengal*," &c. I think, therefore, the proper course will be to reserve the question as to the validity of the bequest for the monument, and to refer it to the Master to inquire what sum would be reasonably required for the purpose of carrying into effect the directions of the testator, by which he provides, &c., adopting the very words of the eighth clause. That form of reference will leave the question, as to the validity of the bequest, open.

Mr. *Bethell* then asked for the costs of all parties out of the estate, including the costs of the appeal, as between solicitor and client, and cited *Moggridge v. Thackwell*. (a)

Mr. *Twiss*, for the Attorney-General, and Mr. *Wigram*, for the *East India* Company, opposed it, except as to the costs of the executors, but

The LORD CHANCELLOR said, he thought the case was a very proper one for an appeal, and that considering the nature of the will, it was very reasonable that all parties should have their costs as between solicitor and client, including the costs of the appeal.

(a) 7 *Ves.* 36.; see p. 88.

1842.

MITFORD
v.
REYNOLDS.

1842.

Dec. 21.

THORPE v. MATTINGLEY.

Where one of several Defendants died pending their joint appeal to the House of Lords, and the House of Lords having admitted his representatives, on their petition, as parties to the appeal, eventually made an order varying the decree below, and dismissing the bill as against that Defendant with costs. Held, that that order might be made an order of the Court below without first reviving the suit.

THIS was a tithe suit, on the hearing of which, in the Court of Exchequer, on the 15th *February* 1837, a decree was made for an account against all the Defendants except *Edmund Plowden*, as against whom the bill was dismissed, but without costs.

All the Defendants appealed from that decree to the House of Lords; and *Edmund Plowden* having died before the appeal came on to be heard, his executors and another person who, on his death, had become tenant in tail of the lands, in respect of which he had been made a Defendant, were, by two orders of the House of Lords, dated respectively the 29th *June* 1838, and the 1st *August* 1839, admitted as parties to the appeal.

By the order of the House of Lords on the appeal dated the 6th *February* 1841, the decree below was reversed, and the bill dismissed with costs as against all the Defendants, and the cause was, in the usual form, remitted back to the Court below, with a direction to do therein as should be consistent with that judgment.

On the 5th of *July* 1841, an application was made to the Court of Exchequer, upon notice, by the surviving Defendants and the executors of *Edmund Plowden*, that the last-mentioned order of the House of Lords might be made an order of that Court, and an order was made accordingly; but that order not having been drawn up before the 15th *October* 1841, when the equity jurisdiction of the Court of Exchequer was transferred to the

the Court of Chancery, it was ultimately entered as an order of this Court.

1842.

THORPE

v.

MATTINGLEY.

The Plaintiff then presented an appeal petition to the Lord Chancellor, praying that the last-mentioned order might be discharged with costs.

The petition now coming on to be heard,

Mr. *Swanston*, in support of it, contended that the order in question was irregular, having been made before the suit had been duly revived. When the House of Lords directed its own order to be made an order of the Court below, it must be taken to have meant that that should be done in such a manner as might be consistent with the forms and practice of that Court. And he referred to the case of *Bertie v. Lord Falkland*. (a)

Mr. *Bethell* and Mr. *Fleming*, *contra*.

Mr. *Swanston*, in reply.

The LORD CHANCELLOR.

I think the order pronounced by the Court of Exchequer was quite right. What the House of Lords intended is evident. They dealt with the record as it stood; but, in order that substantial justice might be done, they took care that the representatives of *Edmund Plowden* should be before them: having heard them, however, they then dealt with the record as it was, and accordingly, in dismissing the bill, they dismissed it as against *Edmund Plowden*, although he was then dead, he being the party actually upon the record. Therefore, when they directed the Court of Exchequer to make their

(a) *Macqueen's Prac. in the House of Lords*, 276.

1842.

 THORPE
 v.
 MATTINGLEY.

their order an order of that Court, they directed that Court to dismiss the bill as against *Edmund Plowden*; and it was not necessary, for that purpose, to have his representatives before the Court of Exchequer.

Petition dismissed with costs.

ANDERSON v. WALLIS.

Dismissal of bill at the hearing, on the ground of misjoinder of Plaintiffs and of subject-matters of suit affirmed on appeal.

IN this case, which is reported on the hearing below in Messrs. *Younge and Collyer's Exchequer Reports*, vol. iv. p. 336., the decree dismissing the bill with costs, on the ground of misjoinder of Plaintiffs and of subject-matters of suit, was affirmed by the Lord Chancellor on appeal, on the same ground and for the same reasons as are assigned in the judgment below.

In addition to the authorities which appear to have been cited in the Court below, the following were cited on the argument of the appeal: *Morley v. Lord Hawke* (a), *Gemmel v. Block* (b), *Cowley v. Cowley* (c), *Buckeridge v. Glasse* (d), *Hoggart v. Cutts*. (e)

(a) Cited 2 Y. & J. 520.

(b) 2 Dick. 513.

(c) 9 Sim. 299.

(d) Cr. & Ph. 126.; see p. 136.

(e) *Ibid.* 197.; see p. 204.

END OF PART I.



REPORTS

OF

CASES

ARGUED AND DETERMINED

1842.

IN THE

HIGH COURT OF CHANCERY.

In the Matter of the Stat. 5 *Vict. c. 5.*, and

In the Matter of the MARQUIS OF HERTFORD.

1842.
Nov. 17.
Dec. 16.
1843.
Nov. 18.

ON the 2d of *June* the Marquis of *Hertford*, as residuary legatee of his late father, obtained an order *ex parte* from Vice-Chancellor *Wigram* under the fourth section of the above-mentioned act, to restrain the transfer of a sum of 4000*l.* new 3½ per cent. annuities then standing in the name of *Nicholas Suisse*, who had been valet to the late Marquis, and against whom an indictment was then pending for the embezzlement of the money with which the stock had been purchased. On the 1st of *July* that order was discharged by the Vice-Chancellor with costs, on the ground that no bill had been filed, and that the restraining order could not properly be continued after sufficient time had been allowed for that purpose. (a) The Marquis however having appealed from that decision to the Lord Chancellor,

An order made under 5 *Vict. c. 5. s. 4*, to restrain the transfer of stock, continues in force, until discharged, after a bill has been filed for the same purpose: and on a motion being afterwards made to discharge it, the Court will allow affidavits to be read as well in opposition to the answer, if then filed, as in support of it.

(a) See 1 *Hare*, 584.

1842.

In re
 The Marquis
 of HERTFORD.

cellor, the execution of the order of the 1st of *July* was, by arrangement between the parties, suspended until the appeal motion could be heard. In the meantime the indictment was tried, and *Suisse* was acquitted: and on the 12th of *July*, being a few days after the acquittal, the Marquis filed a bill against *Suisse*, the Governor and Company of the Bank of *England*, and the executors of the late Marquis, alleging that the stock had been purchased by *Suisse* with the produce of certain cheques which he had received from the late Marquis for the purpose of paying bills, and praying that *Suisse* might be declared a trustee of the stock for the Plaintiff, and that an injunction might be granted to restrain the transfer of it. On the 13th of *July* the appeal motion came on before the Lord Chancellor (*a*), when an order was made, by consent, continuing the restraining order as to 1500*l.*, part of the stock, and reserving the costs of the motion.

Nov. 17. In the course of the next *Michaelmas* term, and before any answer had been put in to the bill, a motion was made on behalf of *Suisse*, who had in the meantime gone abroad, to discharge the order of the 13th of *July*.

Mr. *Sharpe* and Mr. *De Gex*, in support of the motion, contended that the restraining order was merely a provisional remedy, which was intended to enure only until a bill could be filed, and an injunction obtained in the suit; and that, as no such injunction had been moved for, they were entitled, as of course, to have the restraining order discharged.

Sir *Charles Wetherell* and Mr. *Schomberg*, for the Marquis of *Hertford*, submitted that, upon a bill being filed,
 the

(*a*) See *antè*, p. 109.

the restraining order previously obtained under the Act was to be treated in all respects as an injunction obtained in the cause, and that it was unnecessary to move for a new injunction; they asked however that, at all events, the motion might stand over, in order that they might have an opportunity of answering certain affidavits which had been filed by the other side within two days before the motion was made.

1842.

In re
The Marquis
of HERTFORD.

The LORD CHANCELLOR.

As this is the first case that has occurred upon the new Act, it is necessary to proceed with caution. I think the best course will be to let the motion stand over in order that Sir Charles Wetherell's client may have an opportunity of giving a counter notice of motion for an injunction in the cause—the motion may be in the alternative, either that the existing injunction may be continued or a new one granted. Let the two motions come on together on the first seal day after term. We shall then see, from the course which the argument takes, what will be the proper practice in such cases.

The motion accordingly stood over, and the Plaintiff gave a notice of motion in the alternative suggested by the Lord Chancellor, but not until after *Suisse* had put in his answer to the bill.

The two motions now coming on together.

Mr. *Sharpe* and Mr. *De Gex*, for *Nicholas Suisse*, objected to the reading of any affidavits in opposition to the answer, on either motion. The question at issue being simply a question of title to the stock, it was clear, according to established practice, that affidavits could not be read in opposition to the answer, on the Plaintiff's

Dec. 10.

1842.

In re
 The Marquis
 of HERTFORD.

tiff's motion for a new injunction: and if, as had been contended by the other side on the former occasion, the restraining order was to be treated, after bill filed, as an injunction obtained in the cause, affidavits were equally inadmissible, after an answer had been put in, upon the motion to discharge that order.

Sir C. Wetherell and Mr. Schomberg, contrâ.

The authorities cited were 3 *Dan. Pr.* 356, 357. and the cases there referred to.

The LORD CHANCELLOR reserved the objection, and suggested that the most convenient course would be to dispose of both the motions on one argument: for which purpose he would hear the whole case as it stood upon the affidavits as well as upon the answer, and would separate the different parts of the evidence for himself, in case he should be of opinion that, with reference to either motion, any part of it ought to be rejected.

That course was accordingly adopted, and the argument proceeded, upon the merits.

The Plaintiff's case rested on the affidavits which had been filed in support of the original application for the restraining order, and in opposition to the motion of the 13th of *July* to discharge that order. By these affidavits, several of the identical bank notes which had been received by *Suisse*, in payment of cheques drawn by the late Marquis, on his bankers, to an amount exceeding the value of the stock in question, were proved to have been delivered by *Suisse* to his broker, for the purchase of part of the 4000*l.* 3 per cents.

The substance of the case made by *Suisse* in his answer, is stated by the Lord Chancellor in his judgment.

The

The LORD CHANCELLOR.

1842.

In re
The Marquis
of HERTFORD.

An order was obtained in this case, whereby the Bank was restrained from permitting the transfer of 4000*l.* new 3½ per cent. annuities, standing in the name of *Nicholas Suisse*. This order was afterwards discharged. Application was made to me to discharge or vary this last-mentioned order: after some discussion I directed the order to be varied, and that liberty should be given for the transfer of the annuities, with the exception of a portion of them. The parties consented to this arrangement; and the restraining order was continued as to 1500*l.*, subject to the further order of the Court. The prosecution against *Suisse* was depending at the time when the Vice-Chancellor discharged the original order. In the indictment he was charged with having purchased the stock in question, with monies embezzled from the late Marquis of *Hertford*. Upon his trial for the alleged offence he was acquitted, and soon afterwards a bill was filed against him by the present Marquis, to which an answer has been put in.

The present application is to discharge the restraining order as to the 1500*l.*, and affidavits have been filed in support of, and in opposition to, the motion. Some objection was made to the reading of these affidavits; and it was contended on the part of the Defendant, that the question must be decided by the answer. I think there is no foundation for the objection. When a restraining order has been issued, this Court has, by the terms of the Act, full power, upon the application of any parties interested, to discharge or vary it, and the Court will be guided in the exercise of the discretion with which it is intrusted, not merely by the statements contained in the answer, but also by the affidavits filed, as well in opposition to the answer, as in support of it.

P 3

I have

1842.

In re
The Marquis
of HERTFORD.

I have read and considered these affidavits, and the answer of the Defendant, which corresponds in substance with his affidavits. It is obvious, that if this restraining order be discharged, there will, in effect, be an end of the suit. For the stock will be sold out, and, as the Defendant is a foreigner residing abroad, it will be useless to proceed further. Still, however, if I were satisfied with the answer given to the case made against the Defendant, I should not on this account alone continue the restraint. But without meaning to prejudice the ultimate decision of the cause, I am compelled in this stage of the proceeding to say that I am not satisfied with the explanation that has been given.

Considerable reliance has been placed on the result of the trial; but that result is, with me, very far from conclusive. The learned Judge very properly told the jury, that if the matter were doubtful it would be their duty to acquit the prisoner. He suggested to them that the money might probably have been a gift from the late Marquis; but that is not the defence set up in the suit or in these affidavits. The Defendant says he acted as agent for the Marquis in paying very large sums of money on his account; that the produce of the cheques which he received for that purpose was mixed with his own money, and that, although the sums so received, or a part of them, had been laid out in the purchase of his stock, he had applied an equal sum of his own money on account of the Marquis. This is widely different from the explanation suggested by the learned Judge as stated in the affidavits before me. It may be observed, that the principles applicable to criminal cases, the course of the proceeding, and the manner of conducting the inquiry, are so different from the mode of investigation adopted in this Court in deciding upon the civil rights of parties, that the result

result of the former cannot properly be allowed to govern the latter. Without, then, entering into further particulars as to the contents of the affidavits, I will only repeat what I have already observed, that the explanation which they profess to give as to the transaction in question, is, I think, very unsatisfactory, and I do not therefore feel myself justified in discharging the restraining order, and thereby practically putting an end to the suit, in its present stage. It will always be open to the Defendant to renew the application upon any change of circumstances that may appear to warrant it.

1842.
In re
The Marquis
of HERTFORD.

The motion to discharge this order was met by a motion on the other side to continue it, or, in the alternative, to grant an injunction in the cause. It is not, I think, necessary to make any order upon this latter motion. I shall reserve the consideration of the costs of both motions. The motion for discharging the order is refused.

SMITH v. The Duke of BEAUFORT.

1812.
July 16.
Nov. 10. 17.
1843.
Nov. 7.

THIS was a motion to discharge or vary an order of Vice-Chancellor *Wigram*, for the production of certain documents contained in the schedule to the Defendant's answer.

The bill was filed for discovery in aid of the Plaintiff's defence to an action brought by the Defendant

It makes no difference in the principles upon which the Court deals with a motion for the production of documents, for that, the bill being filed for

discovery in aid of a defensive proceeding, the case made by it consists not in the assertion of an affirmative title in the Plaintiff, but solely in the suggestion of specific defects in the title of the Defendant.

1842.

SMITH
v.
The Duke of
BEAUFORT.

for the recovery of certain tolls or dues, which he claimed as payable to him “upon and for coals gotten by the Plaintiff within the Defendant’s manor and seignior of *Kilvey*, in the county of *Glamorgan*, and carried through the said manor, and sold and exported to sea over *Swansea* bar;” to which action the Plaintiff had pleaded the general issue.

The following is an abstract of the material passages in the pleadings.

The bill — after suggesting that the Defendant’s demand in the action was founded on an alleged custom, under which he claimed to be entitled, as lord of the manor and seignior of *Kilvey*, to a payment of 4*d.* for every wey of coal gotten within the said manor and carried through the same, and sold to sea over *Swansea* bar — charged: Firstly, that the amount of the payment had varied at different times, inasmuch as the wey on which the 4*d.* had been claimed, had sometimes been a wey containing 144 bushels or 48 bags, and at other times a wey contained 216 bushels or 72 bags. Secondly, that the alleged custom had been differently laid at different times, having sometimes been laid as including, in the consideration for the payment, ways and places, by way of easement, for laying down the coal by the side of the river *Tawe*, which flowed into *Swansea* bay; although, as the bill charged, the Defendant did not furnish any such easement to the Plaintiff, nor was he the owner of the soil of the said river, nor exclusively the owner of the banks, these being the property of various individual proprietors; besides which, the bill charged, that such easements had in former times been the subject of special contract between the predecessors of the duke and the owners or lessees of mines within the manor; and as an instance of such contracts it set forth an indenture of lease
dat

dated the 8th *December* 1750, by which the then Duke of *Beaufort* had granted to one *Chauncey Townshend* (under whom the Plaintiff claimed) for a term of ninety-nine years, certain wayleaves and privileges over lands lying between the Plaintiff's mines and the river *Tawe*, for the transport of his coals, with power to build wharfs on the banks for the shipment of the same, reserving however to the duke and his heirs all such customary dues and payments as were or should from time to time become due and payable to them as lords of the said manor. The bill further charged, that in a suit instituted by the executors of the late Duke in the year 1838, the alleged custom had been laid as including, in the consideration for the payment, such easement as before mentioned; and that the Defendant had in his possession a survey of the manor, dated the 27th *September* 1686, in which was the following entry: "for every wey of coal wrought within the manor and sold to sea, and for the ways and places to lay it down by the water side, and for the liberties of the river, the sum of 4*d*." It further charged, that the duke had other surveys, inquisitions, books, and documents, "shewing the terms, or supposed terms, of the alleged custom." And in a subsequent passage it charged that the Defendant had, in his possession or custody, various deeds, &c. "relating to the said matters, and whereby the truth thereof would appear."

1842.
SMITH
v.
The Duke of
BEAUFORT.

The Defendant by his answer, after stating his title amongst other things, not only to the manor and seignior of *Kilvey*, but to the castle and manor of *Swansea*, and all royalties belonging to the said manors respectively, and to the sea shore of *Swansea* and *Kilvey*, and to the water channel and soil of the river *Tawe*, and the port and harbour of *Swansea* and the soil thereof, with all tolls, franchises, and privileges thereunto belonging, said, that, with respect to the particular toll in question, he did not rest his claim to it exclusively
on

1842.

 SMITH
 v.
 The Duke of
 BEAUFORT.

on custom, but that he relied generally upon the immemoriality of the payment, to himself and his predecessors in estate, of 4*d.* for every wey of coal gotten within the manor of *Kilvey* and carried through the same, and sold and exported to sea over *Swansea* bar; that there were several other modes in which the right might have originated (and which he specified), without resorting to custom, but he submitted that upon evidence, shewing that the sum of 4*d.* per wey had been paid and received far beyond living memory, and, as he believed, for several hundred years past, a court or law would refer the payment to some valid and lawful origin.

With respect to the first alleged variation, he said that the wey to which the 4*d.* referred, was the ancient wey containing 48 bags, each bag containing 3 bushels of *Winchester* measure; whereas the modern wey was one third larger, containing 72 bags; but that, in latter times, when coals were measured by the new wey, the gross amount due was computed upon the actual number of weys increased by one third, so that the same amount was always paid upon the same quantity of coal, although upon a different number of weys; and that the only real variation in the amount of the payment had occurred between the years 1741 and 1759, during which time the sum of 4*d.* had, by mistake, been received from *Chauncey Townshend* upon the new wey, but which mistake had been afterwards rectified by *Townshend* paying up all the arrears, upon the footing of 4*d.* being payable upon the ancient wey.

With respect to the second alleged variation, he said he did not believe that the alleged custom had been differently laid at different times, for that although the words used might have been different, they had substantially the same meaning and import: that, as to the claim

1842.

SMITH

v.
The Duke of
BEAUFORT.

claim made by the executors of his late father, it was a limited claim founded on custom; whereas his present claim was a general one, being a claim to so much money due and of right payable to him either by custom or otherwise, as before mentioned. He admitted, however, the possession of the survey of *September* 1686, and also "of other surveys, inquisitions, books, and documents containing entries relating to the said payment of 4*d.*, and from which the terms, or supposed terms, of the said payment or duty would appear." As to the charge that the alleged custom had sometimes been laid, as including, by way of easement, ways and places to lay the coal down by the water side, he denied it, but at the same time insisted that he did in fact furnish an easement to the plaintiff, inasmuch as the soil of the river, and the port and harbour belonged to him, and no coal raised by the Plaintiff within the manor could be sold or exported from the river or port without passing over land belonging to the Defendant. He also denied that any of his predecessors had ever made special contracts for ways and places to lay down coal raised within the manor by the river side, and he accounted for the indenture of the 8th *December* 1750 by stating that the liberties and privileges therein mentioned, were granted for a nominal consideration, in order to encourage the exportation of coal, and thereby to increase the revenue of the Duke arising from the payment of 4*d.* in question.

In answer to the general charge as to his possession of documents, he admitted that he had, in his possession or custody, various documents, wholly or in part relating to the matters in the bill mentioned, or some of them, but he denied that thereby the truth of the matters in the bill stated and charged, or any of them, would appear or be elucidated, save as by the said answer was mentioned. And, after referring to the list of such documents

1842.

 SMITH
 v.
 The Duke of
 BEAUFORT.

documents in the schedule, he said that they were the evidences and muniments of his own title as tenant for life, and of that of his eldest son as tenant in tail in remainder, to divers real estates and hereditaments of great extent and value, and to the said duty or payment of 4*d.* per wey, “and did not in any manner evidence or relate to any estate, right, or title whatsoever, of or belonging to or claimed by the Plaintiff; nor were the same in any way material or necessary to or for the Plaintiff’s defence in the action; nor had the Plaintiff any interest whatever in the same, or any of them,” and he submitted that the Plaintiff was not entitled to their production.

A more detailed statement of the pleadings, and also a list of the documents ordered by the Vice-Chancellor to be produced, will be found in Mr. *Hare*’s report of the case in the Court below. (a) It appears from that list, that the documents ordered to be produced consisted 1st, of a series of old audit rolls, rentals, and accounts of the Defendant and his predecessors in estate, extending, with a few intermissions, from the reign of *Henry VIII.* to the present time, and containing entries of receipts of monies in respect of the 4*d.* per wey in question. 2dly, A correspondence by letter between a former Duke of *Beaufort* and his agent, and *Chauncey Townshend*, from the year 1741 to the year 1756. The survey of *September* 1686, and two other surveys of the manor, and the counterpart of the lease of the 8th *December* 1750.

Mr. *Lowndes* and Mr. *Campbell*, in support of the appeal motion.

The order now appealed from, is the first instance in which a Plaintiff, not relying on an affirmative title
 in

(a) 1 *Hare*, 507.

in himself, but merely suggesting a defect in the title of his adversary, has been held entitled to the production of documents which the latter insists are the evidences and muniments of his own title. In *Bolton v. The Corporation of Liverpool* (a), Lord Brougham adverts pointedly to the distinction between these two cases, and says, "A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his own title, defeat it by entitling his adversary." It was said, however, in the Court below, that the doctrine there laid down did not apply to a case in which the bill suggested specific defects in the Defendant's title, and charged that the documents, if produced, would disclose them; in that respect, however, the case of *Bolton v. The Corporation of Liverpool* is exactly similar to the present: for, on reference to the pleadings, in that case, it appears that the bill did suggest that the dues in question had varied both in amount, and in the description of goods on which they had been levied. And the answer, moreover, contained no such denial as there is here, that the documents were material to the Plaintiff's defence in the action. The statement was, simply, that they were the title-deeds of the corporation, and on that ground the production was refused. In the present case, the Defendant relies on the immemoriality of the payment; he says he is prepared to make good his claim at the trial, by proving that the 4d. per wey has been uniformly rendered for so long a period, that a court of law will presume it had a legal origin; and the affirmative of the issue is with him. The Plaintiff's case is simply, that the Defendant will not

1842.
SMITH
v.
The Duke of
BEAUFORT.

(a) 1 *Myl. & K.* 88.

1842.

 SMITH
 v.
 The Duke of
 BEAUFORT.

not be able to sustain the issue : that the documents in question, so far from proving, will disprove it; but is that any reason why the Defendant should be obliged to produce these documents before the trial, to enable his adversary to find flaws in them—perhaps other flaws besides those which he has suggested?

It is said, indeed, that the answer admits that the payments have, for a certain period, not been uniform: but even if that were true, it could only entitle the Plaintiff to the production of the documents relating to that period, and would furnish no ground for a sweeping order to produce all the audit rolls and rentals from the time of *Henry VIII.* downwards. In fact, however, the answer contains no such admission; on the contrary, it satisfactorily accounts for the variation on the ground of mistake, by shewing that it was afterwards rectified; so that substantially it admits no variation at all. If that be the effect of the answer, the present case is, as to this class of documents, on all fours with *Bolton v. The Corporation of Liverpool*, and *Combe v. The City of London* (a), in the latter of which cases Lord Abinger C. B. thus states his ground for refusing the production of certain documents on which some of the Defendants relied as evidence of the usage under which they claimed. “It is asking the Defendants in equity to lay their case before the Plaintiffs in equity, that they may find out an objection. The constancy of the usage may be a very material ingredient in support of it, and their books must prove the case one way or the other; it is clear, therefore, that the Plaintiffs have no right to see the books, to ascertain whether the Defendants have charged more or less at different times. That is asking for a discovery of the weakness of
of

(a) 4 Y. & Coll. 139., see p. 159.

of their adversary's title, and not of the strength of their own."

1842.

SMITH

v.
The Duke of
BEAUFORT.

[*The LORD CHANCELLOR.* In *Combe v. The City of London*, was there any thing more than a general charge of variation? there must be a specific averment; but if there is a specific averment, and you admit it, and do not deny that documents which you admit to be in your possession will shew it, surely you must produce the documents.]

In *Combe v. The City of London*, there were specific charges of variation, as well as in *Bolton v. The Corporation of Liverpool*.

With respect to the other charge of variation, that the custom has been laid in different terms at different times, if the survey of *September 1688* be supposed to furnish any evidence in support of it, we are willing, and indeed offered in the court below, to produce that document; but we submit, that there is no such admission, in the answer to the general charge of variation on this point, as to warrant an order for the production of the other surveys.

Mr. *Lloyd*, *contra*, relied on *Tyler v. Drayton* (a), *Kennedy v. Green* (b), *Burrell v. Nicholson* (c), *Storey v. Lord George Lennox* (d), and contended that the observations attributed to Lord *Abinger* in the passage cited from his judgment in the case of *Combe v. The City of London*, could not be reconciled with the established doctrine of this Court.

Mr.

(a) 2 S. & St. 509.

(b) 6 Sim. 6.

(c) 1 M. & K. 630.

(d) 1 M. & Cr. 525.

1842.

Mr. *Lowndes*, in reply.

SMITH

v.
The Duke of
BEAUFORT.


None of the cases cited is an authority for saying that a party, not alleging an affirmative title in himself, can entitle himself to the production of his adversary's muniments of title, by merely suggesting a specific defect in that title: and still less where the suggestion is either denied, or, which is tantamount to a denial, satisfactorily explained away by the answer. The case of *Burrell v. Nicholson*, which is the only one of those cited that even appears to give any countenance to such a doctrine, is, in reality, no authority for it: for the question at issue was one of boundary, and each party had to maintain an affirmative proposition—the one, that the boundary line ran in one direction; the other, that it ran in another—so that the Plaintiff's case did not consist, as it does here, in a mere negation of the Defendant's title.

If this order is to stand as to the audit rolls and rentals, the consequence will be that there will hardly be any case in which a party, whose only reliance is on the weakness of his adversary's title, will not be enabled, by means of a bill of discovery, to ransack that adversary's evidence before the trial: for he will only have to suggest one or two imaginary defects in the chain of it; and if there be the slightest colour for the suggestion, however satisfactorily it may be explained away, the documents containing that evidence will have to be produced.

The LORD CHANCELLOR.

The question in this case is, whether the Defendant is bound to produce certain documents in his possession,
that

that tend to prove that the alleged custom or ancient payment and claim to the dues demanded by him has varied at different periods as to the quantity of toll, and in other respects, and thereby to impeach its legal existence and validity.

1842.

 SMITH
 v.
 The Duke of
 BEAUFORT.

The Plaintiff states in the bill the variations on which he relies, and charges that the Defendant has in his possession certain documents relating to the said matters, whereby the truth thereof will appear, and prays that he may set forth a list of them. The Defendant admits in his answer that he has in his possession various documents, wholly or in part relating to the matters aforesaid, but denies that thereby the truth of such matters, or any of them, will appear, save as by the said answer is mentioned. He sets forth in a schedule a list of documents.

The defendant having thus admitted that he has in his possession documents which relate to the matters in the bill mentioned, that is, to the variations so stated and set forth by the Plaintiff, he is bound according to the general rule to produce them; and it is not a sufficient answer to say they will not establish the truth of the matters charged by the Plaintiff: still less can it be so when the answer is qualified with the reservation, "save as in the answer mentioned." The Plaintiff has a right to see the documents and to judge for himself.

But it is further stated by the Defendant, "that these documents are his title-deeds, evidences, and muniments, and that they evidence or relate to his right and title to his estates and to the said duty or payment, and do not in any manner evidence or relate to any estate or right belonging to or claimed by the Plaintiff; nor has the Plaintiff any interest in them."

VOL. I.

Q

With

1842.

SMITH
v.
The Duke of
BEAUFORT.

With respect to the latter part of this statement, it is sufficient to observe, that the Plaintiff does not claim the inspection of these documents as evidencing or relating to any estate or right belonging to him; nor does he claim any interest in them in the sense in which the word is here used: he admits them to be the property of, and to belong to, the Defendant. This is not the ground on which he rests his right to inspect them. He claims the inspection of them as relating to the matters charged by him in the bill — to the variations there stated to have taken place at different periods in the alleged custom, ancient payment or claim of toll. This is the ground of his claim. And with respect to the former part of the allegation, in which it is stated, that these documents are the title-deeds, evidences, and muniments of the Defendant, and that they evidence or relate to his right and title to the said duty or payment, the answer is, that the Plaintiff does not require the production of those documents, that exclusively evidence the title of the Defendant, to the dues in question; he requires the production of those which come under the second branch of the alternative, those which relate to the right and title of the Defendant, and which, while they relate to the right and title of the Defendant, relate also to the variations, that is, to the matters charged in the bill, and which the Plaintiff has an interest in establishing. It is obvious that these must be included among the documents which relate to the right of the Plaintiff. These are what the Plaintiff requires: they do not exclusively evidence the Defendant's title: they shew the alleged variations, and thereby tend to disprove it. To these I think he is entitled.

The decision in *Bolton v. The Corporation of Liverpool* was much relied upon in the argument both in this Court and before the Vice-Chancellor. But the principle
upon

upon which that decision proceeded is not, I think, at all at variance with the judgment in this case. The allegation in the answer, there, was, that the grants, deeds and documents were the title deeds and documents evidencing and shewing the title of the corporation to the town dues and customs aforesaid. They were stated to be the proofs of the title of the Defendants. It was observed by the Lord Chancellor that the Plaintiff did not claim any thing affirmatively under the documents. "A party cannot call for the production of documents, which instead of supporting his title defeat it by entitling his adversary. The description of the documents is that they rebut or negative the Plaintiff's title. The Plaintiff cannot call for these documents, merely because they may, upon inspection, be found not to prove his liability." And when the case was before the Vice-Chancellor (*a*), that learned Judge said, "Inasmuch as these documents are described as being documents, which evidence the title of the Defendants, and as nothing is to be inferred from any passage in the answer, that they evidence the title of the Plaintiffs, which they might do, though they evidence the title of the Defendants, I am of opinion that the inspection ought not to be granted." It is clear, therefore, that, in both courts, that judgment proceeded on this principle, that the documents, the production of which was required, exclusively evidenced the title of the Defendants. But in the present case, though the documents relate to the Defendant's title, they also relate to the matters specifically charged in the bill as constituting the Plaintiff's defence; and this is admitted by the answer.

The principle, therefore, on which that decision proceeded is not at variance with the judgment of the Vice-

1842.

 SMITH
 v.
 The Duke of
 BEAUFORT.

(*a*) 3 *Sim.* 467.; see p. 490.

1842.

SMITH

v.

The Duke of
BEAUFORT.

Chancellor in this case, but appears to me to be in accordance with it; I think, therefore, the appeal must be dismissed.

1843.

May 29.

Nov. 15.

TAYLOR v. RUNDELL.

Where a defendant is interrogated as to the contents of the books of a company in which he is a partner, and the question is one which he is bound to answer if he can, it is no excuse for not answering, to say, that the books are in the custody of the officer of the company, and that his partners will not allow him access to them. If he has a right to inspect the documents, he is bound to enforce that right, and the Court will, if necessary, give him time for that purpose.

THIS case came on upon exceptions to the Master's report of the insufficiency of a sixth examination put in by the Defendants under the decree; the exceptions having, by permission of the Lord Chancellor, been set down to be heard by his Lordship in the first instance.

The Plaintiffs were the executors of the late Duke of York, by whom a lease had been granted to the Defendants (nominally for their own benefit, but really as trustees for a mining association in which they were shareholders, and three of the directors) of certain mines in *Nova Scotia*, reserving certain payments to the Duke, depending on the amount of profits to be made by working the mines. The object of the interrogatories was to obtain discovery respecting the working of the mines, and an account of the profits made thereby: and the reason assigned by the Defendants in their several examinations, for not giving fuller information on these points, was, that the books of the association were in the custody of the secretary, who was the common agent of themselves and their co-directors, and that the latter refused to allow them to be inspected.

For the report of the argument on the exceptions to the fifth insufficient examination, see 1 *Y. & Coll. N. S.*

128. The relative position of the Plaintiffs' and Defendants in the suit will be found more fully stated in *Craig and Phillips*, p. 104., on an Appeal before Lord *Cottenham*, respecting the sufficiency of an answer in a different suit, but between the same parties and for a similar object.

1843.
TAYLOR
v.
RUNDELL.

It being now admitted on all hands, that, assuming the statement of the Defendants to be true, they had done all they could to obtain access to the documents in question, short of filing a bill for them,

Mr. *Wakefield* and Mr. *Wood*, in support of the exceptions to the Report, contended, that the Defendants were not bound to take any further steps, and that the examination ought now to be deemed sufficient; that no bill could, in fact, be filed for the purpose of obtaining access to the documents, without also praying a dissolution of the partnership; and that if such a bill were filed, the production of the documents could only be detained at the hearing of the cause, and not upon motion. That the difficulty had been occasioned by the default of the Plaintiff in not making all persons interested, parties to the suit: that partnership books, like partnership secrets, were not to be disclosed to strangers without the consent of all the partners, and that the Court would not compel such a disclosure by some in the absence of the rest. They insisted further, that it was evident from Lord *Cottenham's* judgment upon similar exceptions taken in the other suit, that his Lordship was not prepared to go the length of making the parties file a bill: the case which his Lordship put, of documents being in the hands of the solicitor of a party, was different, for the remedy in such a case was summary.

Mr.

1848.

TAYLOR
v.
RUNDALL.

Mr. *Russell* and Mr. *Giffard*, *contra*, contended that it was too late, after a decree had been made, to say that the suit was not properly constituted as to parties; that the claim of the Plaintiffs was against the Defendants individually upon their covenants, and that the Plaintiffs had nothing to do with the other members of the association; that, according to the statement of the Defendants, their partners had been guilty of conduct amounting to exclusion, and, if that were the case, the Court would, upon a bill being filed, grant an injunction immediately. It made no difference whether the difficulty of procuring access to the documents was greater or less. In *Ex parte Shaw (a)*, Lord *Eldon* said, "that if documents, which a party was bound to produce, were in the hands of his solicitor, and he could not produce them without paying his bill of costs, he must pay it."

Mr. *Wakefield*, in reply.

Nov. 15.

The LORD CHANCELLOR.

This case has come on again upon exceptions to the Master's report. The report states the examination of the Defendants to be insufficient. By the decree of the 5th of *May* 1837, it was ordered that the Defendants *Edmund Waller Rundell*, *Thomas Biggs*, and *John Gawler Bridge*, should produce all deeds, books, &c. in their custody, or power relating to the matters therein mentioned, and should be examined on interrogatories as the Master should direct.

The Defendants in their examination represent that they are unable without the inspection of certain documents

(a) *Jac.* 270.

ments to give any further information than they have already done; that such documents are in the possession of the secretary, and under the joint control of themselves and their co-directors of the mining association, and that the other directors refuse to allow the Defendants to inspect them. They state that repeated applications have been made by, or on the part of, the Defendants to allow the inspection, but always with the same result. The question is, whether this is a sufficient excuse for not further answering the interrogatories; whether, to use an expression of Lord *Eldon's*, parties shall be allowed thus to baffle the jurisdiction of the Court.

1843.
TAYLOR
v.
RUNDELL.

The Defendants are the lessees of the mines: the legal estate is in them; they are also directors of the association, and proprietors or shareholders in the concern. As proprietors they have, by the very terms of the deed of association, a right, subject to certain regulations as to time, &c., to inspect and take copies of the documents in question; and as directors they have a right to the inspection of them at any time: the possession of the secretary is their possession: he is their servant: and their co-directors have no right to exclude them. Is it sufficient then for a party who is required to speak as to the contents of such documents as are in his custody, possession, or *power*, to say, that he cannot comply with the order because his documents are wrongfully withheld from him? I think not. Suppose an agent withholds papers belonging to his principal, would the statement of such a wrongful act be an excuse for not producing them, or not speaking as to their contents? In a former case between these parties, Lord *Cottenham* put the case of a solicitor wrongfully withholding the papers of his client, as affording no

1842.
TAYLOR
v.
RUNDELL.

excuse for the non-production: the Court, he said, would allow the party time to vindicate his right; and the same principle will apply here, though the difficulty may be somewhat greater.

A party is bound to inspect, and answer as to the contents of, all documents that are in his possession or *power*; and all which he has a *right* to inspect, provided he can enforce that right, are in his *power*.

Exceptions overruled.

1842.

Ex parte EYRE.

In the Matter of JOHN WRIGHT and Others,
Bankrupts.

1842.
Nov. 7, 8.
1843.
Jan. 12.

THIS was an appeal, in the form of a special case, from the Court of Review.

The substance of the case was as follows: —

The bankrupts had been in partnership as bankers, in *London*. Some years before the bankruptcy, the petitioner, who was one of their customers, deposited with them a tin box marked with his initials, containing divers valuable securities. The key of the box was placed with other keys of the same description

belonging

A customer of a banking firm, whose practice it was to receive deposits, at their banking-house, of boxes of securities belonging to their customers, for safe custody, lent part of the securities contained in his box to the firm, upon an undertaking

to replace them in three months, or sooner if required; and he afterwards lent other part of such securities to *J. W.*, one of the partners in the firm, on his own separate account, other securities being on both occasions deposited by the respective borrowers, according to agreement, in pledge for those which were borrowed. After the expiration of three months from the time of the first loan the firm, with the consent of the customer, deposited other securities in the box in exchange for those first pledged, and afterwards became bankrupt, when it appeared that the customer had been regularly credited in the books of the firm with interest on all the securities borrowed, but that *J. W.* had, without the knowledge either of his co-partners or the customer, abstracted the securities pledged by himself upon the second loan, and had applied the proceeds to his own individual use.

Held, 1st, that the value of the securities lent to the firm was not a contingent debt within the fifty-sixth section of 6 G. 4., and that, as there had been no demand for their replacement before the bankruptcy, the customer had no proveable debt in respect thereof, either against the joint estate or any of the separate estates.

2dly, that the firm was not responsible for the abstraction by *J. W.* of the securities pledged upon the second loan, although the key of the box, as well as the box itself, was left in the custody of the firm, inasmuch as it did not appear that the firm had any authority to open the box or to examine its contents: and consequently that the customer had no right of proof, in respect of the second loan, against the joint estate, but only against the separate estate of *J. W.*

And, *semble*, even if the firm had been chargeable for the abstraction on the ground of negligence, the claim would have been only a claim for unliquidated damages, and therefore not proveable against the joint estate.

1842.

Ex parte
EYRE.

belonging to other customers of the bank, on lettered pegs in a desk or cupboard at the banking house, and “the said boxes and their keys” (as the case stated) “were in the custody and care of the partnership.”

In the month of *September* 1838, the petitioner’s box contained, amongst other securities, certain *Cuba* bonds to the amount of 53,200*l.*, which were transferable by delivery, and bore interest at 6 per cent. payable in *London*. In the course of that month the bankrupt, *John Wright*, requested the petitioner to lend him 25,000*l.* of those bonds on the security of some certificates of shares in the *Southampton Railway Company*, with which request the petitioner complied, and thereupon *John Wright* wrote to him the following letter.

“*London, September 19th, 1838.*

“I hereby, in consideration of your lending me 25,000*l.* *Cuba* bonds, deposit with you 400 certificates in the *Southampton Railway*, and which 400 shares I hereby in every way agree to assign to you, till the said *Cuba* bonds are redeemed by me; and should I fail in my obligation, you are at liberty to dispose of the same for your own reimbursement within four months.

“*John Wright.*”

On the same day 25,000*l.* *Cuba* bonds were taken out of the box, and 398 *Southampton Railway* certificates were deposited in their place together with the letter, and the next day the following memorandum, which was drawn up by *Joseph Beadle*, a clerk in the bank, was also placed in the box.

“For the loan from Mr. *E. Eyre* to Mr. *J. Wright* of 25,000*l.* *Cuba* bonds, Mr. *W.* has deposited in Mr.

Eyre's box, 398 shares in the *Southampton* Railway Company as a security, to which Mr. *Wright* will add some other shares when received.

1842.

Ex parte
EYRE.

"Sept. 20th, 1838.

"For *W.* and Co.

"*Joseph Beadle.*"

In pursuance of the engagement contained in that memorandum, *John Wright* afterwards added 23 other *Southampton* Railway certificates, and deposited the same in the box, making altogether 421.

In the month of *November* 1839, an application was made to the petitioner by the partnership firm, to lend them the remainder of the *Cuba* bonds, amounting to 28,200*l.* upon their depositing with him, as a security, certain *American* securities, called *Norris Town* and *Valley* Railway bonds, to the amount of 33,000*l.*, to which application the petitioner having acceded, the rest of the *Cuba* bonds were, on the 23d *November*, taken out of the box, and the *Norris Town* and *Valley* Railway bonds were deposited in their place, and, on the same day, *J. Wright* wrote to the petitioner a letter containing the following passage.

"In respect of 28,200*l.* *Cuba* bonds, which I borrowed from you this day on account of the house, we deposit as a security 33,000*l.* *Norris Town* and *Valley* Railway bonds, and we hereby engage to replace the said *Cuba* bonds at or within the expiration of three months from this date, if you should require us to do so."

On the 27th *February* 1840, the *Norris Town* and *Valley* Railway bonds were, at the request of the partnership, exchanged for *Cairo* City and Canal bonds to the same amount, and the latter were deposited in the box in their place.

On

1842.

Ex parte
EYRE.

On the 23d *November* 1840, the bank stopped payment, having regularly credited the petitioner in the books half yearly with interest at 6 per cent. upon the whole amount of the *Cuba* bonds, down to the 5th *September* preceding. Immediately on hearing of the stoppage, the petitioner went to the banking-house and asked for the box, when, on examining its contents, he found, what he was not before aware of, that the *Southampton* Railway certificates had been taken out, and some debentures of the *Commercial* Steam Packet Company, and several *American* securities, deposited in their place; he also found the following memorandums in the handwriting of *Joseph Beadle*, a clerk in the bank, endorsed on the letter of the 19th *September* 1838.

“ *July* 13th, 1840. Delivered to Mr. *John Wright*, certificates for 100 shares, part of the within mentioned shares deposited as a security, in lieu of which he has deposited 5000*l.* bonds of the *Maryland* Iron and Coal Company for the same purpose.

“ For *W.* and Co.

“ *Jos. Beadle.*”

“ *July* 30th, 1840. Delivered to Mr. *John Wright*, 100 *Southampton* Railway shares, part of the within mentioned, of which 21 are returned.

“ *J. B.*”

“ *October* 21st, 1840. Delivered to Mr. *Wright*, 50 *Southampton* Railway shares, part of the within mentioned, and deposited in lieu thereof 5000*l.* *Commercial* Company debentures.

“ *J. B.*”

“ 30th *October* 1840. Delivered to Mr. *Wright*, 100 shares, further part of the within mentioned, and deposited

posited in lieu thereof 5000*l.* *Commercial Steam Com-*
pany debentures.

1842.

“ *J. B.*”

Ex parte
EYRE.

“ 13th *November* 1840. Delivered to Mr. *Wright* the
remaining 100 shares.”

The fiat issued on the 17th *December* 1840.

In addition to the facts above mentioned, it appeared from affidavits of *John Wright* and *Joseph Beadle*, which were set forth as part of the special case, that none of the other partners in the bank were privy to any of the transactions referred to in these memorandums; that the loan of the 25,000*l.* was a private transaction between the petitioner and *J. Wright* individually; and that the *Southampton* Railway shares, as well as the securities substituted for them, were his private property; and that no part of the proceeds of the *Southampton* Railway shares was received by the partnership. It further appeared from the affidavit of *Beadle*, that though clerk to the firm, he was in the habit of attending to the private business of *John Wright*, and that he often subscribed his name as acting for the firm in private transactions of the individual partners, as well as in matters relating to the firm itself; and that, in this instance, he had no authority from the firm, or any of the other partners, to interfere with the securities lodged by the petitioner with *J. Wright*.

The petitioner, by his petition to the Court of Review, had prayed that the *Cairo* City and Canal bonds and also the securities which had been substituted for the *Southampton* Railway shares might be sold, and that he might be at liberty to bid, and that he might also be at liberty to prove the deficiency of the loan of 28,200*l.*

Cuba

1842.

Ex parte
EYRE.

Cuba bonds against the joint estate, and the deficiency of the loan of 25,000*l.* *Cuba* bonds against either the joint estate, or each of the separate estates of the bankrupts.

The order made upon that petition referred it to the commissioner to ascertain the value of the 25,000*l.* *Cuba* bonds on the 13th *July* 1840, and the petitioner was declared to be a creditor of the separate estate of *John Wright* for such value. And it was ordered that the securities substituted for the *Southampton Railway* shares should be sold, with liberty to the petitioner to bid; and if the proceeds of such sale should be insufficient to pay the petitioner the value of the 25,000*l.* *Cuba* bonds, he was to be at liberty to prove for the deficiency against the separate estate of *J. Wright*. And it was declared that the petitioner had not a proveable debt, in respect of the 28,200*l.* *Cuba* bonds, against the joint estate of the bankrupts.

Nov. 7.

On the special case now coming on to be argued,

Mr. Swanston, *Mr. Dixon*, and *Mr. H. Clarke*, for the assignees, objected, that the petitioner was precluded from calling in question that part of the order which related to the 25,000*l.* *Cuba* bonds: first, because he had acted upon it, by proceeding to a sale of the securities, without the consent of the assignees; and, secondly, because he had, previously to applying for the special case, presented a petition of rehearing to the Court of Review, in which he had complained of that part only of the order, which related to the 28,200*l.* *Cuba* bonds.

The LORD CHANCELLOR said he should reserve the objection until he should have heard the whole case.

Mr.

Mr. *Bethell* and Mr. *Purvis*, for the Appellant.

1842.

Ex parte
EYRE.

First, as to the 28,200*l.* *Cuba* bonds lent to the partnership,—the Court below considered that this part of the petitioner's claim was governed by the rule in *Utterson v. Vernon* (a), and that as no demand had been made for the replacement of the bonds before the bankruptcy, there was no proveable debt: but we submit that that case has no application, inasmuch as the firm by crediting the Petitioner with interest in their books, dispensed with the necessity of a demand, and made the loan a present debt. *Ex parte Dowman*. (b) Besides the rule in *Utterson v. Vernon* was repealed by the fifty-sixth section of the 6 G. 4. c. 16. relating to contingent debts, *Ex parte Tindal*. (c) And even if it was not, it cannot govern this case: for the meaning of the letter of the 19th of *September* 1838 was, that the bonds were to be replaced at the expiration of three months at all events, and sooner if required; and therefore the contract was broken by not replacing the bonds at the end of that time, and no demand was necessary.

Next, as to the 25,000*l.* bonds lent to *J. Wright* individually. The claim of the petitioner, as to this, is twofold; a claim *ex contractu* against *J. Wright*, and a claim *ex delicto* against the other partners; for the *Southampton* railway shares having been intrusted to the custody and care of the firm, all the partners were jointly and severally responsible for a breach of trust committed by any one of their number, *Devaynes v. Noble, Clayton's Case*. (d) The Court below, indeed, distinguished that case from the present, on the ground that, here, the partnership derived no benefit from the fraud; but the doctrine of this Court as to the liability of trustees, recognizes

(a) 4 *T. R.* 570.

(c) 8 *Bing.* 402.

(b) 2 *Gl. & J.* 241.

(d) 1 *Meriv.* 572.

1842.

Ex parte
EYRE.

recognizes no such distinction, *Walker v. Symonds* (a),
Munch v. Cockerell. (b)

Mr. Swanston, Mr. Dixon and Mr. Clarke, for the assignees.

The case, as regards the loan of the 28,200*l.* to the firm, is not within the fifty-sixth section of the bankrupt act. To constitute a contingent debt within the meaning of that section, the demand must either be in its original nature pecuniary, as was the case in *Ex parte Tindal*, or, if arising from a breach of contract, the breach must have been committed before the bankruptcy, and the damages must be of such a nature as to be ascertainable by the commissioners without the intervention of a jury. *Ex parte The Lancaster Canal Company* (c), *Boorman v. Nash* (d), *Yallop v. Ebers* (e), *Green v. Bicknell* (g), *Ex parte Thompson*. (h) In the present case, neither of these conditions is fulfilled: for, in the first place, the substitution of new securities, in lieu of the *Norris Town* and *Valley* railway shares, which was made with the consent of the petitioner after the expiration of the three months, was a waiver of the original obligation to replace the bonds within that period, even supposing that the letter of *September* created such an obligation; and, secondly, foreign bonds are not like stock in the *British* funds, the market price of which on a given day may be readily ascertained.

As to the other claim, the loan of the 25,000*l.* *Cuba* bonds was a private transaction between the petitioner

(a) 3 *Swanst.* 1.

(b) 8 *Sim.* 219.

(c) *Mont.* 27.

(d) 9 *B. & C.* 145.

(e) 1 *B. & Ad.* 698.

(g) 8 *Ad. & Ell.* 701.

(h) 2 *D. & Ch.* 126.

1842.

Ex parte
EYRE.

titioner and *J. Wright*, and the demand against the firm is a demand founded not upon contract, but upon an alleged breach of trust, in suffering the railway shares to be abstracted from the box. The case, however, is not one of trust but of bailment, and of bailment without hire: for it does not appear that the bankers derived any benefit from the deposit. It has been generally supposed that bankers have no lien for their customers' balance, upon plate or other property of that kind deposited with them; which shews that they don't take charge of such things in the character of bankers, but only for the accommodation of their customers. If so, they are bound only to take ordinary care of the articles; and in order to charge them with a loss, it is necessary to make out a case of gross negligence. For that, however, there is here no pretence, for though the key was left at the bank, it does not follow that the bankers had any right to open the box, and if not, they had no means of knowing what securities were from time to time contained in it.

The LORD CHANCELLOR. It seems difficult to maintain that argument as you have put it; for the special case states, as a fact, that the securities — not the box merely, but the securities — were left in the custody and care of the partnership. But there is another view of that part of the case which has struck me, and it is this — that, after the box and the securities had been left with the partnership to take care of, *Mr. Eyre* entered into a transaction with one of the partners for the separate interest of that partner; he communicated with that partner alone, and authorized him to take out part of the securities, and to substitute others in their place; now, if he considered the securities as under the care of the partnership, he ought, every time that he exchanged any of them, to have informed the partners; otherwise,

VOL. I.

R

how

1842.

Ex parte
EYRE.

how were they to know what the box from time to time contained?

Mr. *Purvis* in reply.

1843.
Jan. 12.

The LORD CHANCELLOR.

This is a special case from the [Court of Review, arising out of the bankruptcy of Messrs. *Wright* and Co.

No objection has been raised by the assignees, as to that part of the order by which Mr. *Eyre* is allowed to prove in respect of the 25,000*l.* *Cuba* bonds against the separate estate of Mr. *Wright*. The principal question is, whether he is entitled to prove against either the joint or separate estates in respect of the 28,000*l.* *Cuba* bonds which were lent to the partnership.

They undertook in the first instance to replace them at or within three months, if required to do so. No application for that purpose was made; and after the expiration of the three months the partnership requested permission to exchange the original securities, which they had so deposited, for the *Cairo* bonds. This was accordingly done, but without any new stipulation as to the period of redemption. After this transaction, therefore, the time for replacing the *Cuba* bonds became indefinite: and it was not incumbent upon the partnership to replace them, until they were requested so to do on the part of Mr. *Eyre*. But, as no such demand was made before the bankruptcy, I think the Court of Review properly decided that this was not a debt that could be proved under the fiat. The provisions of statute 6 G. 4., respecting the proof of contingent debts,

was

was referred to in the argument; but it does not appear to me that those provisions have any application to the present question.

1843.

Ex parte
EYRE.

The remaining question is, whether the partnership estate is liable for any loss that may have been sustained by the subtraction, from Mr. *Eyre's* box, of the *London and Southampton* railway certificates, and the substitution by Mr. *Wright* of other securities in lieu of them, without the authority of Mr. *Eyre*. It was objected, that the petitioner was not entitled to complain of this part of the order. First, because having presented a petition of rehearing to the Court of Review, he confined his complaint to so much of the order as related to the 28,000*l.* *Cuba* bonds; and, secondly, because he acted upon this part of the order, by insisting upon the sale of the substituted securities, in opposition to the wishes and remonstrances of the assignees. The Judge of the Court of Review was of opinion under these circumstances, that Mr. *Eyre* had no right to have this question raised upon the special case. I do not think it necessary to express any opinion upon this point. For as the case has been fully argued before me, not only upon the question of form but upon the merits, it will be more satisfactory, upon the view I have taken of the case, to determine it upon the latter ground—upon the substance, rather than the form.

It is material, for this purpose, to advert to the facts as stated in the special case. The transaction as to the 25,000*l.* *Cuba* bonds, and the substitution of the railway certificates, was entirely a private and separate transaction between Mr. *Eyre* and Mr. *Wright*. The partnership had nothing to do with it. They had no interest in the railway certificates, nor, when the certificates were withdrawn by Mr. *Wright*, were they applied in

1843.

Ex parte
EYRE.

any way to the use of the partnership. The act was a tortious act committed by one partner, not acting for the partnership or for any partnership object, but in his separate character, and for his own individual and separate purposes. The decision in *Devaynes v. Noble*, which was cited, proceeded upon a very different state of circumstances. In that case the Exchequer bills were sold by the acting partner without the knowledge of *Devaynes*, but for partnership purposes, and the money was applied to the use of the partnership. The amount therefore became a partnership debt, and the estate of *Devaynes* was of course liable. The facts of the present case are wholly different, for the abstraction of the railway certificates was a wrongful act committed by *Wright* for his own private purposes, and, under the circumstances which I have stated, I think the partnership was not responsible.

It was contended, however, that the joint estate was liable on another ground, viz.: that, as the securities were deposited with the partnership, they were bound to see that they were not subtracted, and that they are chargeable by reason of their negligence. But Mr. *Eyre* permitted Mr. *Wright* to exchange the railway certificates for the *Cuba* bonds: the partnership was not consulted upon that occasion; and when Mr. *Wright* substituted the other securities for the railway certificates, why was it to be supposed that this was not done with Mr. *Eyre's* sanction as in the case of the former exchange? The box, indeed, was in the custody of the partnership; but it does not appear from the case, that they had any right to examine the contents. Mr. *Eyre* had access to it whenever he pleased, and might remove, or authorize any other person to remove whatever portion of them he might think proper, without consulting or asking leave of the partnership. It does not appear to me,

me, therefore, that there is any ground for imputing negligence to the partnership in this transaction, or to charge the joint estate with the loss which Mr. *Eyre* has sustained.

1843.
Ex parte
EYRE.

But supposing a case of negligence had been established so as to render the partnership liable, this would rather, I think, be a case of unliquidated damages requiring the intervention of a jury, than a debt to be proved under the fiat. I am of opinion, therefore, upon the whole matter, that the judgment of the Court of Review should be affirmed, and with costs.

In re THOROLD a Bankrupt.

1843.
 August 2.
 October 16.

THIS was an appeal, in the form of a special case, from the Court of Review. The question which it raised was, whether, according to the true construction of the twenty-fourth section of the 5 & 6 *Vict. c. 122.* (a)

If a bankrupt has failed to commence any action, suit, or other proceeding to annul the fiat within the

time limited for that purpose by the twenty-fourth section of 5 & 6 *Vict. c. 122.* the Court of Review has no discretionary jurisdiction to entertain a petition, presented after that time has expired, to annul the fiat, however satisfactorily the delay may be accounted for.

(a) Be it enacted, that if the bankrupt shall not, if he were within the United Kingdom at the date of the adjudication, within twenty-one days after the advertisement of his bankruptcy in the *London Gazette*, or if he were in any other part of *Europe* at the date of the adjudication, within three months

after such advertisement, or if he were elsewhere at the date of the adjudication, within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the *Gazette* containing such advertisement

1843.

In re
THOROLD.

the *Gazette* in which a bankruptcy is advertised, is, at the expiration of the time mentioned in that section, conclusive evidence of such bankruptcy, for the purpose of excluding the exercise of a discretionary jurisdiction by the Court of Review, to annul the fiat on the ground of the absence of the legal requisites. The Chief Judge of that Court being of opinion that it was not intended to be conclusive evidence for that purpose, had, in this case, entertained a petition by the bankrupt to annul the fiat, after twenty-one days had elapsed from the date of the advertisement, and had ordered that the petition should stand over in order that witnesses might be examined, *vivâ voce*, as to whether the legal requisites did or did not exist.

The special case, which was prepared at the instance of the assignees by way of appeal from that order, after stating that the fiat issued on the 12th of *December* 1842, that the adjudication took place on the 22d, and that on the 24th a duplicate of it was served on the bankrupt who was then a prisoner in *Nottingham* gaol, proceeded to state the steps thereupon taken by the bankrupt, which were, in substance, as follows.

On the 25th of *December* the bankrupt wrote a letter to the commissioner acting in the prosecution of the fiat, stating that he had never been a trader, and
begging

vertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been

adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the *Gazette* to bear date.

1843.

In re
THOROLD.

begging to be informed what course he should take for the purpose of annulling the fiat: that letter having been answered on the 27th by the official assignee, the bankrupt, on the 28th, wrote to his solicitor in *London*, directing him if possible to prevent the advertisement of the bankruptcy in the *Gazette*, but if that could not be done, to take proper proceedings for annulling the fiat: it being, however, then too late to shew cause against the adjudication, the bankruptcy was advertised in the *Gazette* on the 30th of *December*. On the 18th of *January*, the solicitor sent the draft of a petition to annul the fiat to a Mr. *Payne* who was his agent at *Nottingham*, with instructions to get it signed by the bankrupt: but owing partly to the accidental absence of Mr. *Payne* from *Nottingham*, and partly to the necessity of sending the petition back to *London* for amendment, the presentation of it was delayed until the 28th of *January*.

The special case now coming on to be argued,

Aug. 2.

Mr. *Anderdon* and Mr. *Dixon* appeared for the appellants.

Mr. *Swanston* and Mr. *Terrell*, for the respondent.

The LORD CHANCELLOR gave the following judgment, in writing, during the long vacation.

Oct. 16.

By the twenty-third section of 5 & 6 *Vict. c. 122.*, the bankrupt is allowed five days, after being served with a duplicate of the adjudication, to shew cause against its validity. If he omits to do so, notice of the adjudication is to be published in the *London Gazette*. Still,

R 4

however,

1843.

In re
THOROLD.

however, he is not precluded from disputing the fiat, but he must do this within a certain limited time. For by the twenty-fourth section, if he shall not, within twenty-one days after the advertisement of the bankruptcy in the *Gazette*, have commenced an action, suit, or other proceeding to dispute or annul the fiat, the Gazette containing such advertisement shall be conclusive evidence in all cases as against the bankrupt, and in all actions at law and suits in equity brought by the assignees suing in respect of the bankrupt's estate, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat. A petition to the Court of Review to annul the fiat is, I think, obviously comprehended within the words "other proceeding" in this section. But the "proceeding" as well as the "action or suit" must be commenced within twenty-one days. The rule is, I think, imperative. It may be too rigid, but the Court has, I conceive, no authority to relax it. If it should be found inconvenient or productive of hardship, the legislature must apply the remedy.

The question, therefore, in this case is, whether the proceeding was commenced within the time limited by the act, and I think it was not. The commencement of the action or suit is the suing out of the writ, and the commencement of the proceeding by petition is, I conceive, the presenting of the petition. Neither the notice to the commissioner, nor the mere preparation of the petition can, I think, be considered as the commencement of the proceeding within the meaning of this section. It must be an act analogous to the commencement of an action or suit. Accordingly in the seventeenth section of the previous act 1 & 2 *W. 4. c. 56.*, which is in *pari materia*, the time for disputing the adjudication runs from the presenting of the petition to the Court of Review.

1843.

In re
 THOROLD.

Review. “ If any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition, praying the reversal thereof, to the Court of Review (such petition to be presented within two calendar months from the date of such adjudication), such Court of Review shall proceed to hear and decide on the said petition.” I refer to this act merely for the purpose of illustrating and confirming my opinion as to what, in the case of a petition, is to be considered the commencement of the proceeding. As to the effect of the clause in other respects, it may be observed, that it has not the strong negative words contained in the twenty-fourth section of the new act.

If I am right in my construction of the statute, it seems superfluous to consider the reasons assigned to excuse the delay in presenting the petition. But I cannot avoid observing that the instructions to dispute the fiat were sent to the solicitor as early as the 28th of *December*, and it does not appear why the petition was not ready for the bankrupt's signature before the 18th of *January*. A little more activity in this respect might have rendered the circumstance of Mr. *Payne's* absence altogether immaterial.

I think the order cannot be supported.

1843.

1842.
Dec. 9. 12.
1843.
May 11.

JONES v. SMITH.

Upon an assignment of an outstanding mortgage term, in consideration of a further advance, the assignee was informed that a settlement had been made upon the marriage of the mortgagor, but was assured by him and his wife that it related only to the fortune of the wife, and did not include the mortgaged estate, although in fact it did. Upon a bill filed by the eldest son of the marriage, who was tenant in tail under the settlement, Held, that the assignee of the term was not affected with notice of the settlement, it appearing from the Plaintiff's own evidence, that the assignee had really believed the representation so made to him to be true.

BY a settlement made on the marriage of *David Jones* the Plaintiff's late father, dated the 31st of *August* 1820, *David Jones*, in consideration of 1000*l.* the fortune of *Sarah* his intended wife, conveyed a certain real estate (which was then vested in him in fee, subject to a mortgage term of 500 years, for securing 2000*l.* to *Samuel Bennett*), to the use of himself for life, with remainder to a trustee, to preserve contingent remainders; with remainder to the use and intent that *Sarah* his wife should receive out of the rents an annual sum of 100*l.* by way of jointure, in bar of dower, with remainder to the first and other sons of the marriage in tail; with remainder to *David Jones* in fee.

In the year 1823, *Thomas Smith*, who was an attorney at *Chester*, at the request of *Jones* paid off *Bennett* and took an assignment of the mortgage term, and upon the faith of a representation by *Jones*, that the mortgaged estate was not included in the marriage settlement, made further advances to him from time to time upon the same security, by means of which advances the debt due upon the mortgage amounted, on the 28th *February* 1824, to 4000*l.* *Thomas Smith* died in the year 1834, and *David Jones* in the year 1836. And in 1838 the bill was filed by the eldest son of the marriage against *Esther Smith* as the administratrix of *Thomas Smith*, and other parties, praying amongst other things, a declaration that *Esther Smith* might stand an incumbrancer

incumbrancer on the estate to the extent of 2000*l.* only, on the ground that at the time of advancing the money, *Thomas Smith* had notice of the settlement.

1843.

JONES

v.

SMITH.

The account given of the transaction by the Defendant coincided with the statement contained in the following letter, dated in *October* 1836, written by *Thomas Smith*, after he had become acquainted with the contents of the settlement, and which was put in evidence by the Plaintiff.

“At the times I made the advances both *Jones* and his wife solemnly assured me, and indeed offered to make oath, that no settlement was made of his estates on their marriage, but that a settlement was made of her fortune of 1000*l.* only. I placed confidence in this statement.—Previous to the last *Ruthin* assizes they applied to me for a further loan, which I consented to advance upon having a deed in trust to sell, and a fine levied by *Jones* and his wife, and I then required a sight of the settlement: this was at last brought to me; and, to my great surprise, I found it to be a settlement of his estates previous to his marriage; in consequence of which I declined advancing the money. *Jones* and his wife solemnly declare that they never gave instructions for the settlement, and that they never knew the contents until it was brought to me, which was a few days before the last *Ruthin* assizes.”

In addition to that evidence, the Plaintiff examined his mother *Sarah Jones*: she having previously released her jointure under the settlement. Her evidence was as follows: “The first time I became acquainted with *Thomas Smith* was in the summer of 1823. He came to *Acre House* for the purpose of seeing the property of my late husband, before he put a mortgage upon

1843.

JONES
v.
SMITH.

upon it. I was present on that occasion, and no one else but my child. On that occasion, *Thomas Smith* asked me a question as to the settlement made on my marriage with *David Jones*. The question he asked me was, 'How did you come to bestow your all on so needy a person?' I replied, 'I have not been quite so improvident and simple as that.' He said, 'I understand you had a pretty good fortune.' 'I told him what I had, and that my friends had taken care of me before my marriage.' He said, 'In what way?' 'Had you a settlement?' I replied, 'Yes, I had.' He then asked me where it was, and said, 'I must see it.' I said, 'It was with my brother.' This conversation took place before dinner. No other person except my said child was present at it. She is dead. After dinner, *Thomas Smith*, addressing my husband, said, 'I understand this good lady has taken care of herself, and I must see the settlement.' My husband replied, that he was afraid that he (*Thomas Smith*) could not see it without displeasing my aunt, who he said was a rich old lady, and it might be an injury to him (my husband), or words to that effect. *Thomas Smith* asked, if he could not see it without her knowing it? More was said upon the subject which I do not exactly recollect; but my husband at length promised, that he would try and get it from my brother for the said *Thomas Smith*. There was no one else, excepting *Thomas Smith*, my husband, and myself, present when this last conversation took place. At that time, to the best of my knowledge, *Thomas Smith* had not advanced my husband any money. When I last saw the settlement, it was in the possession of *Thomas Smith*, who then refused to deliver it to me, saying, that he would keep it with the deeds, where it ought to have been long ago; and that neither Mr. *Jones* nor I had any thing to do with the property, as it was entailed. I told him I was sorry
for

for it, that I did not know that it was entailed, or that there was any more than 100%. settled upon it.

1843.

JONES

v.

SMITH.

At the hearing of the cause before Vice-Chancellor *Wigram*, his Honor held that the Defendant was not affected with notice of the settlement; from which decision the Plaintiff appealed, and the appeal now came on to be heard.

Mr. Bethell and *Mr. Parry*, in support of the appeal.

The Vice-Chancellor in stating the grounds of his decision in this case (*a*), began by dividing the cases of constructive notice into two classes: the first, consisting of those cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected; the second, of those in which the Court has been satisfied from the evidence before it, that the party had designedly abstained from enquiry for the very purpose of avoiding notice; and, in the passage of his Honor's judgment which immediately follows, he says that the proposition of law upon which the second class of cases proceeds is, not that the party had incautiously neglected to make inquiries, but that he had designedly abstained from such enquiries for the purpose of avoiding knowledge. (*a*) Now the question upon this appeal is, whether this enunciation of the doctrine (upon which, be it observed, the whole of his Honor's subsequent reasoning proceeds) excluding, as it does, those cases in which the party has omitted to make enquiry, not with any fraudulent intent, but merely from want of due caution, is warranted by the previous authorities on the subject.

We

(*a*) 1 *Hare*, 55. See however *West v. Reid*, 2 *Hare*, 257. *et seq.*, where the Vice-Chancellor refers

to this part of his judgment in the principal case and explains it.

1843.


 JONES
v.
SMITH.

We submit that it is not. In *Hiern v. Mill* (a), Lord *Ervine* states the principle thus: "The law imputes that notice, which from the nature of the transaction, every person of ordinary prudence must necessarily have." In *Jackson v. Rowe* (b), Sir *J. Leach* says, "although he (the purchaser) may in fact have been ignorant of the settlement, according to the averment of the plea, yet in equity he must be fixed with all the knowledge which it was reasonable he should acquire." In *Whitbread v. Jordan* (c), Baron *Alderson* is still more explicit. "A purchaser," he says, "is not indeed bound to use extraordinary circumspection: nor, on the other hand, do I apprehend it to be necessary to make out express fraud on his part. If he be grossly negligent in omitting to inquire, it is at all events sufficient to fix him with notice." So in *Kennedy v. Green* (d), the caution required from a purchaser is described by Sir *J. Leach* as ordinary or reasonable caution; and it is evident, from the context, what it was that his Honor meant by that term; not the caution of a man unused to the forms and habits of business, but legal caution, such a caution as implies familiarity with professional subtleties and technical forms; for, after observing that, to a professional eye, the receipt on the back of the deed would have indicated irregularity, though to an ordinary person it might not, his Honor adds "he cannot protect himself from implied notice by not having used the ordinary caution of employing a solicitor." And lastly, in accordance with all these authorities Sir *E. Sugden* (e) says, "What is sufficient to put a purchaser upon inquiry is good notice."

Now

(a) 13 *Ves.* 114. See p. 120.(d) 5 *M. & K.* 699. See p. 713.(b) 2 *S. & St.* 472. See p. 475.(e) 3 *V. & P.* 468.(c) 1 *B. & C.* 303.

1843.

JONES
v.
SMITH.

Now how can it be said that there was not sufficient in this case to put the Defendant upon inquiry, when it appears that he was informed of the existence of a settlement, that a suspicious excuse was given for its non-production, and a representation made as to its contents by the very party who was interested in deceiving him? Was his conduct in resting satisfied with such a statement, consistent with that ordinary prudence, that reasonable caution, which is required from a purchaser? The Vice-Chancellor thought, and no doubt rightly, that the negligence was not such as to raise a presumption of wilful blindness: but it appears from the cases above referred to, that much less than wilful blindness is sufficient to fix a party with notice; and that the real doctrine of the Court is what the Vice-Chancellor calls a vague and untenable position, namely, that a purchaser is bound to use ordinary and reasonable caution. If it be asked what else he should have done, the answer is, that which was given in *Ferrars v. Cherry* (a), "If he could not obtain a sight of the deeds he should have inquired of the wife's relations." Suppose a party dealing with an heir for the purchase of an estate, were told that the ancestor left a will, but that it included only leasehold estates. Would any prudent person rely on such a statement, or think that it dispensed with further inquiry? The most satisfactory test of what reasonable caution requires in any given case is the practice of experienced conveyancers, and it is certain that no conveyancer would allow such a purchase to be completed without ascertaining from an inspection of the will, that it did not include the property in question. It is said indeed, that the cases are not parallel; for that a will imports a disposition of a man's whole property, whereas there is no presumption that a man settles all his real estate on his marriage. That,

(a) 2 Vern. 384.

1843.

JONES

v.

SMITH.

That, however, is not such a distinction as a conveyancer would in practice think it safe to rely on: and, therefore, for the present purpose at least the cases are analogous, and the same measure of caution which is shewn to be used in the one, may fairly be required in the other.

Mr. *Turner* and Mr. *Bacon*, for the respondent.

All the cases in which a purchaser has been held to have had constructive notice of the contents of an instrument which he has not actually seen, have been cases in which he had actual notice that the instrument in question, or some other instrument the inspection of which would have led him to it, related to the property which was the subject of his contract; whereas, in this case, the only notice which the Defendant had was of a settlement, which he was at the same time assured did not relate to the property. If the doctrine were not to be so limited, if a party were to be affected by every instrument he might hear of, which might or might not relate to the property, notwithstanding an assurance that it did not so relate, it would be impossible for any man who had notice that any part of a large estate was in mortgage to purchase or take a security upon any other part, without requiring the production of every mortgage deed of which he might have had such notice. The cases of *Miles v. Langley* (a), *Plumb v. Fluit* (b) and *Evans v. Bicknell* (c), are all instances of the disposition of the Court to limit rather than to extend the doctrine of constructive notice. *Whitbread v. Jordan* (d) stands upon the very verge of the doctrine, and can only be reconciled with the last-mentioned cases, either on the supposition that the evidence taken altogether shewed wilful blindness on the part of the mortgagee, or that the
notoriety

(a) 1 R. & M. 39.

(b) 2 Anstr. 452.

(c) 6 Ves. 174.

(d) 1 Y. & C. 303.

notoriety of the custom among publicans to deposit their title deeds with their brewers, was equivalent to actual notice to the mortgagee of the purpose to which the deeds which were not forthcoming had been applied.

Hiern v. Mill. (a)

1843.

JONES
v.
SMITH

It is suggested that the Defendant in this case ought not to have been satisfied with the statement of *Jones*, and that he ought to have required the settlement to be produced; but suppose that after what had passed between Mr. and Mrs. *Jones* and the Defendant, relative to this settlement, the latter had refused to complete his contract for the mortgage unless the settlement were produced; would the Court have listened to such a suggestion as a defence to a bill for specific performance? *M'Queen v. Farquhar.* (b) A purchaser may have reason to suspect that his vendor has committed an act of bankruptcy, yet such a suspicion would be no answer to an action for the purchase money.

But whatever be the limits of the general doctrine of constructive notice, the Plaintiff in this case has precluded himself from the benefit of it by his own evidence. For constructive notice is nothing more than a presumption of notice arising from certain facts; it is true, that where the presumption exists it is so violent that the Court will not allow it to be controverted by the party against whom it is raised; but in this case the presumption is negatived by the very party who seeks to raise it; for it is in the Plaintiff's own evidence that we find it stated as a fact, that the mortgagee placed confidence in the assurance given to him that the estate in question was not included in the settlement. (c)

Mr.

(a) 13 *Ves.* 114.

(b) 11 *Ves.* 467.

(c) Besides the cases referred to in the text, the rest of those

which were cited in the Court below (see 1 *Hare*, 43.) were also commented upon in the course of the present argument.

1843.

JONES

v.
SMITH:

May 11.

Mr. *Bethell*, in reply.

The LORD CHANCELLOR.

This was an appeal from a decision of Vice-Chancellor *Wigram*, and was a case involving the doctrine of constructive notice.

The first question was, whether the transaction on the part of *Thomas Smith* was *bonâ fide*. Mr. *Smith* was applied to to advance money on mortgage security. No antecedent debt was due to him; he paid his money at the time upon the execution of the security, and he had no motive whatever for advancing money on insufficient, imperfect, or doubtful security. Up to this point of the case, therefore, there is no reason to suppose that the transaction on his part was otherwise than perfectly fair, honest, and *bonâ fide*. The question then is, whether there is any thing to the contrary in the evidence. Now, the evidence consisted of a letter of *Thomas Smith*, and a deposition of *Sarah Jones*, who was the widow of *David Jones*. In the letter it was stated, that when applied to to advance money upon this security, *Smith* asked, whether there was any settlement executed on the marriage of *David* and *Sarah Jones*: he was told there was a settlement, but that it was confined to the wife's property, which consisted of 1000*l.*, and did not extend to the real estate of *David Jones*; and both *Jones* and his wife offered, if necessary, to make oath as to the truth of that statement. That letter of *Thomas Smith* was put in by the Plaintiff as his evidence, — his representation of the transaction. In addition to that there was the evidence of *Sarah Jones*: she was the mother of the Plaintiff, and she executed a release of her interest under the settlement, which I think was 100*l.* a year, in order to render herself a competent witness: the bias on her mind must have been strongly in

in favour of the Plaintiff, but her evidence does not tend to contradict the statement given by *Thomas Smith* in the letter to which I have alluded, and which was made evidence by the Plaintiff. I must, therefore, take that statement to be in substance correct. It is further to be observed, that in the course of her testimony a reason is assigned why *Thomas Smith* did not insist on the production of the settlement. *Smith* asked for it, and was told by *David Jones* that it was in the possession of his wife's brother, and that he was afraid he could not get possession of it without displeasing his aunt, who was a very rich old lady. Under these circumstances, putting credit in the statement that was made he advanced money on the mortgage, and I think under these circumstances, the conclusion that the Vice-Chancellor came to was correct — that the transaction was fair, honest, and *bonâ fide* on part of Mr. *Smith*: and, indeed, nothing was advanced at the bar for the purpose of leading to the conclusion that there was any thing morally improper in his conduct with reference to the transaction.

1843.
JONES
v.
SMITH.

The question therefore resolves itself into this, whether, where a party is informed of the existence of an instrument which may, but which does not necessarily, affect the property he is about to purchase, or upon which he is about to advance money, and it is at the same time stated, that the instrument does not affect that property, but relates to some other property, whether, if he acts fairly and honestly, and believes that statement to be true, but it turns out in the result that he is misled, and that the instrument does relate to the property, he is under such circumstances to be fixed with notice of the contents of the instrument? Undoubtedly, where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does

1843.

JONES

v.

SMITH.

affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers: but where a party has notice of a deed which does not necessarily — which may or may not — affect the property, and is told, that in fact it does not affect it but relates to some other property, and the party acts fairly in the transaction, and believes the representation to be true, there is no decision that goes the length of saying that if he is misled, he is fixed with notice of the instrument. I am not disposed to extend the doctrine of constructive notice, and in expressing this opinion, I believe, I act in conformity with the opinion frequently expressed by my immediate predecessor.

As to the cases which were cited in the argument, many of them have no bearing on this case, and others go to establish principles which are not in controversy, and which do not admit of dispute; but the cases which have the most direct bearing upon the present are *Jackson v. Rowe*, *Whitbread v. Jordan*, and *Kennedy v. Green*, decided first by Sir *J. Leach*, Master of the Rolls, and afterwards by Lord *Brougham*. As to *Jackson v. Rowe* the case was this. Mrs. *Jackson's* mother on her marriage had an estate settled on her for life, with power of appointment in favour of her children. She survived her husband, and executed the power in favour of her daughter, and continued in the receipt of the rents, and married a second husband. On that marriage — I am stating now what must be inferred from the form of the pleadings — she represented that she was seised in fee, and she executed a conveyance in fee to her husband; the husband received the rents during his life, and upon his death his son claimed the property as heir or devisee. And the contest was between the wife's daughter, Mrs. *Jackson*, in whose favour the appointment was made, and *Rowe* the son. It was
contended

contended that the husband was a purchaser for value without notice, and, as the consideration was admitted, the question turned on notice. Now it is obvious in that case, that if the husband, at the time of the marriage, had looked at the deed, the only deed under which Mrs. Jackson's mother claimed the property, he must have seen that she had only an estate for life : and it was very properly decided by the Vice-Chancellor, that if he allowed a purchaser for value to hold under those circumstances, it would enable any disseisor to make a marketable title, and on that ground the Vice-Chancellor decided the case in favour of the Plaintiff, and no one can find fault with that decision. Either the party did, or he did not investigate the title; if he did not, he was guilty of great negligence; if he did, he must have seen that the party conveying to him had only an estate for life. It does not appear to me, therefore, that the case of *Jackson v. Rowe* has any very close application to the present case.

1842.

JONES
v.
SMITH.

Then comes *Whitbread v. Jordan*, decided by Baron Alderson in the Exchequer. The case first came before me, and I have revived my recollection of the facts by looking at the report of it, and it appears to me that that case was decided on the ground, that the learned judge was satisfied that the transaction was not *bonâ fide*, and that the party had purposely abstained from making inquiry, the money being advanced for securing a pre-existing debt; that, in short, there was wilful blindness. That was evidently the impression on the mind of the learned judge, but he said, that even if it were not so, the facts of the case were such as to amount to negligence of so gross a nature, that it would be a cloak to fraud if it were permitted. These were the principles upon which that case was decided, but which do not appear to apply to the present.

1842.

JONES
v.
SMITH.

As to the case of *Kennedy v. Green*, a fraud had been committed on Mrs. *Kennedy*, and for the purpose of accomplishing it, a fraudulent deed had been executed: *Green*, the purchaser of the estate, had nothing to do with the fraud, and the question was, simply, whether he had notice of it. Generally, notice to an attorney is notice to the client. Mr. *Bostock* was his attorney, and the question was, whether *Bostock* had notice. Now *Bostock* had notice in this particular way. He had been himself concerned in and the party guilty of the fraud: but this Court, in opposition to the opinion of Sir *J. Leach*, was of opinion that that was not a species of notice which ought to affect *Green*. But then it was said, and properly said, that even supposing that to be the case, and leaving out of consideration the circumstance that Mr. *Bostock* knew of the transaction, as having been an actor in it, yet, as an attorney acting for *Green*, he must, upon the bare inspection of the deed, have had such a suspicion of fraud raised in his mind, as to have rendered it imperative on him to make further inquiry; and upon that ground the case was decided in favour of the Plaintiff.

These were the cases which were pressed most strongly upon me in the argument, but it does not appear to me that they have any close bearing upon the present. Undoubtedly, in the present case, a cautious, prudent, circumspect person would not have advanced money without production of the deed: but that is not the principle on which cases of this sort have been decided. The case of *Cothay v. Sydenham* (a), which was one of the cases cited at the bar, was of this description. A party had notice of the draft of a settlement having been actually prepared: in fact he had himself prepared it. The question was, whether he was to be considered as
having

(a) 2 B. C. C. 391.

1842.

JONES
v.
SMITH.

having constructive notice of the deed itself. Now, a prudent, cautious, and wary person knowing that a draft had been prepared, would take care to inquire before he advanced his money, whether a deed had been executed in conformity with that draft; yet Lord *Thurlow* held, that a party having notice as a purchaser—the case was that of a trustee, but he put the case of an ordinary purchaser—that the draft of a deed had been prepared, was not to be considered as having constructive notice of the deed itself, unless he knew that the deed had been executed. Suppose that, in this case, the party had been told that there was no settlement: it is quite clear he would not have been affected with notice: still, notwithstanding the statement that there was no settlement on the marriage, a person about to advance his money, if he were a very prudent, cautious, and wary person, would inquire of the connections of the parties, whether or not a settlement had been executed, before he advanced any considerable sum of money.

I don't think, therefore, that the present case goes beyond this, that a prudent, cautious, and wary person would have inquired further. The want of that prudence, caution, and wariness is not sufficient, according to the decisions and the principles which have hitherto been acted on, to affect the party with notice. I do not consider this a case of gross negligence: and I am of opinion that the party having acted *bonâ fide*, and having only omitted that caution which a prudent, wary, and cautious person might and probably would have adopted, is not to be fixed with notice of this instrument. I am satisfied that he acted *bonâ fide* in the transaction, and under these circumstances I think the Vice-Chancellor's decision was right, and that the appeal must be dismissed with costs.

1843.

May 27.
June 3.

In the Matter of T. G. WAINEWRIGHT and Wife.

AND

In the Matter of the Stat. 3 & 4 W. 4. c. 74.

On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement.

LANDS were devised by a will to the use of a married woman for life, with remainder to the petitioner in tail, with remainder over. The husband of the tenant for life having been transported for felony, this petition was presented, praying that the Lord Chancellor, as protector, under the Act, of the settlement made by the will, would be pleased to consent to a disposition of the estate by the Petitioner for the purpose of barring the entail.

The Vice-Chancellor of *England* to whom the application had been made in the first instance had refused it, being of opinion that the case was not provided for by the act. (a)

The application was now renewed by way of appeal, before the Lord Chancellor.

Mr. *Humphry* and Mr. *Walford*, appeared for the Petitioner.

June 3.

The LORD CHANCELLOR.

The question in this case arises out of the construction of the act for the abolition of fines and recoveries.

Mrs. *Wainewright* was tenant for life under the settlement, and, as owner of this prior estate, she and her husband became protector of the settlement. The husband

(a) See 11 Sim. 552.

1843.

In re
WAINE-
WRIGHT.

husband was convicted of felony, and the question was whether under those circumstances the Court of Chancery and the wife together could consent to a disposition of the property. The Vice-Chancellor thought not. I have considered the case, and with the greatest respect for the judgment of the Vice-Chancellor, I have come to a different conclusion.

The first point to be considered is, the constitution of protectors under the act. The owner of the prior estate is the protector, and where husband and wife have the prior estate, they jointly constitute the protector. Where, also, in a settlement several persons are nominated to fill the office of protector, the entire body is called the protector of the settlement. But if you look at the act, you find that the term protector is not confined to the aggregate body, but that the individuals constituting the body are separately styled protectors. This is clearly the case in the 48th section which provides, that where the Court of Chancery is the protector of a settlement in lieu of any person, and there is "any other person protector of the same settlement jointly with such person," a disposition by the tenant in tail, though approved by the Court, shall not be valid unless such other person "being protector as aforesaid" shall consent thereto. So in the 91st section, to which I shall have further occasion to refer, provision is made for the case where the Court of Chancery is the protector of a settlement in lieu of the husband of a married woman. I think, therefore, that in the construction of this act, the term protector is applicable equally to the entire body taken collectively, and to each individual separately.

Referring now to the 33d section, we find it provided, that if any person protector of a settlement shall

1843.

In re
WAINE-
WRIGHT.

shall be convicted of treason or felony, the Court of Chancery shall be protector of the settlement in lieu of such person. If then, the term protector applies to each individual, this clause comprehends the very case in question: that is, if the husband is to be called protector, and the wife to be called protector as well as both together to be called protector, the case comes distinctly within the terms of the act.

But if there were any doubt upon this point, it would be removed by the 91st section, which appears to dispose of the precise case. By that clause the Court of Common Pleas is authorized to dispense with the concurrence of a husband to his wife's disposal of property in the event of his being of unsound mind, or under other disabilities; and it is then provided, that the clause shall not apply to the case of a married woman where, under the act, the Lord Chancellor or Court of Chancery shall be the protector of a settlement in lieu of her husband — clearly contemplating in that provision, what I say is the natural construction of the 83d clause, that the Court of Chancery may be protector in the place of the husband. And the application of the 91st section becomes the stronger, when it is considered that the question can only arise where the wife is protector by reason of her estate, for, if she were appointed by name to be protector, the concurrence of her husband would not be requisite, and if this be so, the proviso could hardly apply to any other case than the present.

It would, indeed, be very extraordinary if it should be otherwise; if the legislature should have thought it necessary to provide for a case which very rarely occurs, viz.: — that both husband and wife should be convicted of felony and should have omitted to provide

vide for a case of comparatively ordinary occurrence. Nothing but the clearest expressions would justify such a construction of the statute.

1843.

In re
WAINE-
WRIGHT.

The doubt seems to have arisen from the direction in the 24th section, that the husband and wife together should be the protector of a settlement in respect of the wife's estate, and be deemed one owner. But it is clear, for what reason that direction is given. It had been declared by the preceding section, that where there were joint tenants or tenants in common, each should be a distinct protector as to his own share; and it was intended that this should not apply to the case of husband and wife, but that the concurrence of both should be requisite to the disposal of any part of the property.

I am of opinion, therefore, that the case is within the act. There is, however, an omission in the 33d section, which it is proper to notice. The words are—“If any person, protector of a settlement, shall be convicted of treason or felony; or if any person not being the owner of a prior estate under a settlement shall be the protector of such settlement and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant or whose existence cannot be ascertained,”—omitting the case of a person convicted of treason or felony. — But I think that the omission must be supplied by implication, otherwise no effect can be given to the previous words, “if any person protector of a settlement shall be convicted of treason or felony.” Now these words cannot be struck out of the act, and it is much more natural to supply the words “in lieu of the person who shall be convicted” than to adopt a construction which would deprive

1842.

In re
WAINE-
WRIGHT.

deprive the preceding words of all meaning. No difficulty, therefore, arises out of this omission, and, as I am told, the Vice-Chancellor laid no stress upon the circumstance.

1842.

Nov. 16.

1843.

Jan. 31.

The surety, for costs, of a Plaintiff resident abroad, became bankrupt a few days after the decree dismissing the bill with costs, and before the costs had been taxed under it. The Plaintiff having afterwards presented a petition of rehearing, the Court ordered the proceedings upon it to be stayed until the Plaintiff should have found a new surety.

LAUTOUR v. HOLCOMBE.

THE Plaintiff being resident abroad, had, in an early stage of the suit, been required to give the usual security for costs. The cause was heard on the 17th *March* 1842, when the bill was dismissed with costs. A few days after, and before the costs had been taxed under the decree, the surety for costs became bankrupt; and, in the month of *July* following, the Plaintiff, being still abroad, presented a petition of rehearing.

Mr. *Bethell* now moved on behalf of the Defendant, that the Plaintiff might give better security for the costs, or that the appeal might be stayed.

Mr. *Wakefield*, *contra*, said that the motion was unprecedented, that the cause was out of Court by the dismissal of the bill, and that there was no instance of security for costs being required between a decree dismissing the bill and an appeal. It was the right of the appellant to have his cause reheard on making the usual deposit, and giving the usual undertaking for the payment of the costs of the appeal, and the Court had no authority to impose terms upon him in the exercise of that right. The appeal did not put the Defendant in a worse position for recovering the costs of the suit than he was in before. Why should it put him in a better?

better? At all events, the application came too late. The appellant's briefs had been delivered and his counsel instructed, and the appeal, but for particular circumstances, would have been already in the paper. A party, who asked security for costs, should come promptly, and not wait until the cause was ready to be heard.

1842.
LAUTOUR
v.
HOLCOMBE.

Mr. Bethell in reply.

It is not for the Plaintiff to say that the cause is out of Court, when he has himself given it a new existence by his petition of rehearing. There might be some ground for the argument on the other side if no security had been given or required before the decree: but the former order is the foundation of the present motion: and if it was right to require security then, it is still more right now.

The LORD CHANCELLOR said, he did not see why a new security should not be given for the costs of the suit in the place of that which had failed; and he should therefore order the Plaintiff to find a new surety within fourteen days. The delay, however, in making the application, had been such, that he did not think he should be justified in staying the hearing of the appeal; the briefs had been delivered and counsel instructed before the motion was made. He would therefore hear the appeal, and it would be for him to consider, when he had heard it, what he would do in case the security should not, in the meantime, have been perfected.

Nov. 25.

That order not having been complied with, and the appeal, in consequence of several postponements for the convenience of counsel, being still unheard,

1843.
Jan. 31.

Mr.

1842.

 LAUTOUR
 v.
 HOLCOMBE.

Mr. *Bethell* and Mr. *Beavan*, on behalf of the Defendant, now moved that the appeal might be dismissed with costs, or that the hearing of it might be stayed until the Plaintiff should give security according to the course of the Court, pursuant to the order of the 25th November. They cited *Camac v. Grant* (a), *Cliffe v. Wilkinson* (b), *Veitch v. Irving* (c), *Tredwell v. Birch*. (d)

[On *Camac v. Grant* being cited,

The LORD CHANCELLOR said, The Vice-Chancellor seems, in that case, to have ordered, that if security were not given within a certain time, the bill should be dismissed. That is rather a strong measure: at common law the order would be a stay of proceedings, and not that judgment should be entered for the Defendant. (e)]

Mr. *Wakefield*, *contra*, observed, that although the motion was, in form, a motion for security, it was, in effect, a motion for payment of the costs of the suit: for no sooner would the security be given, than it would be enforced for the payment of the costs already taxed. All the cases cited were cases of security for future costs. What was asked here was security for costs already incurred, for which there was no precedent.

The LORD CHANCELLOR.

When the Court orders security to be given, it means effectual security. In this case security had been given before the decree; but the surety afterwards became bankrupt.

(a) 1 *Sim.* 348.

(b) 4 *Sim.* 122.

(c) 11 *Sim.* 192.

(d) 1 *Y. & Coll.* 476.

(e) See *Fox v. Blew*, 5 *Mad* 147.; see p. 149.

bankrupt. All that the Court is now asked to do, is to make the security what it originally was, and what the Court originally intended it to be. But, in fact, I consider that I have already decided this question, when the case was last before me. The reason I did not then stay the proceedings was, that the application was made too late. I therefore said I would order security to be given, and, if it was not given, I would then consider what was to be done. Since that time two months have elapsed, and nothing has been done: there has been ample time for the party to complete the security, and I think the proceedings must now be stayed till he does.

1842.
LAUTOUR
v.
HOLCOMBE.

In consequence of this order, the security was duly perfected, and the appeal came on to be heard on the 21st *April* 1843, when it was dismissed with costs.

PANTON v. LABERTOUCHE.

1843.
July 5.

THE Plaintiff, who was abroad, having been ordered to give security for costs, his solicitor executed a bond, as his surety, to the clerk of records and writs for 100%.

Where a Plaintiff is required to give security for costs, it is irregular for his solicitor to be his surety.

A motion was now made on behalf of the Defendant that the bond might be set aside, and that the Plaintiff might be ordered to procure some other person in the place of the solicitor, to give security according to the course of the Court, before the Defendant should be obliged to answer the bill.

Mr.

1843.



PANTON

v.

LABER-
TOUCHE.

Mr. *Bethell* and Mr. *Piggott* for the motion, contended that it was irregular for a solicitor to be security for his client in such cases. That in the courts of common law there was an express rule against it; and that the principle of policy upon which that rule was founded, namely, the protection of solicitors against the importunity of their clients, applied equally to courts equity.

Mr. *Lloyd*, *contra*.

The LORD CHANCELLOR.

I cannot call the practice irregular, because there appears to have been no previous decision upon the point. But I think it an improper practice, and that the rule in the courts of common law being founded upon sound policy, a similar rule ought to prevail here. I shall, therefore, make the order.

1842.

M'DERMOTT v. KEALY.

Jan. 31.

1845.

Feb. 13.

A TESTATOR gave and devised all the residue of his real and personal estate, on trust out of the rents, issues, and profits, to pay certain annuities to his widow, his son, and his daughter, during their respective lives, and to accumulate the surplus of such rents, &c. during their joint lives, and the life of the survivor; and on trust upon the death of the survivor, to sell and convert the whole into money; and to pay and divide the proceeds unto and amongst the children of his said son and daughter, as and when they should respectively attain twenty-one, with cross limitations over, of the shares of such children as should die under that age, to the survivors.

The testator died in 1814, his son in 1816, and his widow in 1817. A suit having been instituted shortly after the testator's death for the execution of the trusts of the will, a decree was made in the year 1818, by which the will was established, and the trusts thereof were directed to be carried into execution.

In the year 1835 the period of twenty years from the testator's death expired; but the testator's daughter being still living, the income of the property continued to be accumulated as before: and various orders were after that time made in the cause for the payment of costs and other expenses incidental to the execution of the trusts of the will, out of the accruing income; and, lastly, by an order made by the Vice-Chancellor on the 30th of *January* 1840, on the petition of some of the children of the testator's daughter,

The enrolment of a decree of a Vice-Chancellor does not require his signature as well as that of the Lord Chancellor.

Semble, the enrolment of an order subsequent to a decree, though it recites the decree, is not *per se* an enrolment of the decree; but Held, that it equally prevents a rehearing of the decree, at least where the latter cannot be varied without being made inconsistent with the order.

1842.

M'DERMOTT

v.

KEALY.

who had attained twenty-one, it was ordered that an allowance of 100*l.* a year should be made to each of them out of the accruing rents and profits and income of the real and personal estate during the life of their mother, or until the further order of the Court, which order was afterwards enrolled. The enrolment, which was in the usual form, after reciting the bill and answer, the decree, and the petition on which the order in question was made, and further reciting that “upon hearing the said petition, the said decree, and certain subsequent orders [enumerating all the previous orders subsequent to the decree], the Court did order, &c.,” proceeded thus:—“It is therefore this present day, the 30th of *January* 1840, by the Right Honorable *Charles Christopher*, Baron *Cottenham* of and in the County of *Cambridge*, Lord High Chancellor of *Great Britain*, and by the High and Honorable Court of Chancery, and the power and authority thereof, ordered and adjudged that &c. [pursuing the words of the order in question].

Cottenham, C.

On a motion now made on behalf of the testator's heir at law, who was one of the defendants, to vacate that enrolment,

Mr. Wakefield, for the motion, took two points.

1st. That the enrolment was an enrolment not merely of the order of 1840, but also of the decree: and that as the decree was much more than six months old, the enrolment of it was irregular in not having been preceded by an order for leave to enrol it *nunc pro tunc*.

2d. That

2d. That the enrolment ought to have been signed by the Vice-Chancellor, by whom the order was made, as well as by the Lord Chancellor. (a)

1842.
M'DERMOTT
v.
KEALY.

Mr. Tinney, *contra*, contended that the signature of the inferior judge was required only to decrees and orders of the Master of the Rolls, and he cited 2 *Smith's Pr.*, p. 4.

The LORD CHANCELLOR.

As to the first point, I think the enrolment is the enrolment of the order only, the decree being merely recital. On the second point it seems to me, upon the reason of the thing, that the correct rule is as stated in Mr. Smith's book, and that there is a distinction between decrees or orders made by the Master of the Rolls and those made by the Vice-Chancellor. If the decree is made by the Master of the Rolls, it must be signed by the Master of the Rolls as well as by the Lord Chancellor; but if made by the Vice-Chancellor, it is *quasi* the decree of the Lord Chancellor, and consequently requires the signature of the Lord Chancellor only; but I will direct an inquiry to be made in the proper quarter as to the practice.

In the course of the same day his Lordship said that the result of his inquiry was, that where the decree or order enrolled was the decree or order of a Vice-Chancellor, it was not necessary to have the Vice-Chancellor's signature as well as the Lord Chancellor's.

Motion refused with costs.

The heir at law afterwards presented a petition of appeal from all the orders made subsequently to the year

(a) 2 *Dan.* 681.

1843.

 M'DERMOTT
 v
 KEALY.

year 1835, and so much of the decree as directed that the trusts of the will should be carried into execution, insisting that such direction ought to have been restricted to the period during which the trusts were consistent with the rules of law, and that, inasmuch as the trusts for accumulation since the year 1835 were void for excess, he was entitled, as heir at law, to the rents of the real estates which had accrued during that period, and which might accrue until the death of the surviving annuitant.

After the usual order had been made for setting down the appeal to be heard, certain other parties in the suit gave notice of a motion to discharge that order and to take the petition off the file for irregularity.

Feb. 18

The appeal and the motion now coming on to be heard together, a discussion again arose as to whether the enrolment of the order of the 30th of *January* 1840 was or not, in effect, an inrolment of the decree on which that order was founded. While that discussion was going on, the Lord Chancellor sent for information as to the practice in the Enrolment Office, and received the following certificate, which was signed by the four Clerks of records and writs: —

“ We humbly certify to your Lordship that in our experience the practice has ever been, in enrolling an order on further directions, or other order subsequent to a decree, to include in such enrolment a recital of the decree and of any subsequent reports and orders (if any) made in pursuance of such decree, and leading to the first-mentioned order. And it has always been considered that the preceding decree and orders so recited, as well as the last-mentioned order, were thereby enrolled.”

In

In illustration of that certificate Mr. *Berry*, one of the Clerks who had signed the certificate, and who was in Court, instanced the case of an order to foreclose absolute, in a suit for foreclosure of a mortgage, which he said the plaintiff often caused to be enrolled, and which always recited the decree, and he submitted that it would be singular if, after that, the original decree should be subject to a rehearing.

1843.

M'DERMOTT
v.
KEALY.

Upon the certificate being read,

Mr. *Russell*, who appeared for the appellant, observed that the question was not so much what was in practice the form of the enrolment as what was the effect of it; upon which the opinion of the officers who had signed the certificate was of comparatively little weight. If the certificate was right as to the latter point, what became of the rule that, unless a decree or order were enrolled within six months, it could not be enrolled without an order to enrol it *nunc pro tunc*?

The LORD CHANCELLOR. If you ask my opinion on the terms of this instrument, I should say the decree was mere recital; but you see what is the certificate of officers of great experience upon the subject. However, it appears to me that whether the enrolment of the order does or does not operate as an enrolment of the decree, it equally prevents me in this case from reviewing the decree; for the order proceeds upon the ground that the trusts for accumulation are still in force, and directs certain payments to be made out of the income upon that footing. Now, it is clear that I cannot meddle with that order, as it has been enrolled; and therefore if I were to vary the decree, as suggested by the appellant, [should be involving the estate in inconsistent orders. The only course, therefore, for the appellant is to carry

T 3

his

1843.

M'DERMOTT
v.
KEALY.

his appeal to the tribunal which is not bound by the enrolment, and by which alone the whole case can be disposed of. The party moving must have the costs of the motion to get rid of the order to rehear, and I think he must also have the costs of the appeal.

If the Appellant goes to the House of Lords, I should advise him, notwithstanding what has passed here, to enrol the decree first before he goes there.

Mr. *Tinney*, Mr. *Stuart*, Mr. *Mylne*, Mr. *Shebbeare*, and Mr. *Giffard*, appeared for other parties.

Jan. 26.
Nov. 3.

APPLEBY *v.* DUKE.

When the provisional assignee under the Insolvent Act is made a Defendant in that character to a bill of foreclosure, in respect of the equity of redemption, he is not entitled to his costs from the Plaintiff, although he may have received no assets of the insolvent wherewith to pay them.

PENDING a suit for the foreclosure of a mortgage, one of the devisees of the equity of redemption, who was a Defendant, took the benefit of the Insolvent Act; and the provisional assignee in whom his estate thereupon became vested, having been brought before the Court by supplemental bill, submitted by his answer to act as the Court should direct, on being paid his costs, stating that he had not received any assets of the insolvent wherewith to pay them.

At the hearing of the cause before Vice-Chancellor *Wigram*, it was insisted on behalf of this Defendant, that his costs should be paid by the Plaintiff and added to the mortgage debt; but the claim being resisted on the part of the Plaintiff was disallowed by the Court. (a)

This

(a) See 1 *Hare*, 503.

This was an appeal by the provisional assignee from that decision.

1843.

APPLEBY
v.
DUKE.

Mr. *Stuart* and Mr. *Follett*, for the appellant, relied on long-established practice, in illustration of which, besides the cases of *Peake v. Gibbon* (a), *Woodward v. Haddon* (b), *Boswell v. Tucker* (c), which were cited in the Court below, they referred to *Weaving v. Count* (d), and also produced eleven cases from the Registrar's book in the Exchequer, in which the costs of provisional or official assignees had been similarly provided for. With respect to *Hunter v. Pugh* (e), decided by Lord Cottenham, and on the authority of which the Vice-Chancellor had rested his decision in the present case, they attempted to distinguish it, first, on the ground that it was not a suit for foreclosure; and, secondly, that it did not in that case appear but that the assignee had assets to which he could resort for payment of the costs, whereas in this case the contrary was distinctly stated; observing that, in *Boswell v. Tucker* the present Master of the Rolls, while he doubted the propriety of the rule in ordinary cases, had admitted that under such circumstances it might be perfectly proper.

Mr. *Wakefield* and Mr. *Chandless*, for the mortgagee, adopted the argument contained in the Vice-Chancellor's judgment, and cited *Hughes v. Kelly*. (g)

Mr. *Stuart*, in reply.

The LORD CHANCELLOR.

The Defendant *Sturgis*, the provisional assignee under the Insolvent Debtors' Act, was made a party to this

(a) 2 *Russ. & Mylne*, 354.

(b) 4 *Sim.* 606.

(c) 1 *Beav.* 493.

(d) 6 *Sim.* 439.

(e) 1 *Hare*, 307. n.

(g) 2 *Connor & Lawson*, 231.

1843.

APPLEBY

v.

DUKE.

this suit by supplemental bill. The suit was for a foreclosure. He did not disclaim, but submitted by his answer to act as the Court should direct, upon being paid his costs, &c. He further stated that he had received no assets. The question is, whether he is entitled to receive his costs from the mortgagee, in which case they would, of course, be added to the debt due from the mortgagor.

The course of the Court has been to allow these costs. In *Peake v. Gibbon* they were allowed by Sir John Leach, on the ground that "the provisional assignee was a public officer, who did not take upon himself by any act of his own to represent the insolvent, but on whom the duty of representing the estate was thrown for public convenience." This was followed by *Woodward v. Haddon*. The decision of the Vice-Chancellor in that case, after consulting the Lord Chancellor and the Master of the Rolls, was the same as in *Peake v. Gibbon*. *Weaving v. Count* before the same learned Judge, was decided on the authority of *Woodward v. Haddon*. Other cases in the Court of Exchequer to the same effect, but not reported, were referred to in the argument at the bar. It did not, however, appear that the attention of the Court had in any of these instances been directed to the question.

In *Boswell v. Tucker* the present Master of the Rolls considered that he was bound by the previous decisions, though "he did not perfectly understand the reasoning of the cases cited." He added, "I give the costs, because the cases authorise it." These decisions were cited before Lord Cottenham upon the argument in *Hunter v. Pugh*. He dissented from them in principle, and did not consider himself bound by their authority. *Hunter v. Pugh*, it is said, was not a bill of foreclosure.

foreclosure. This is true, but the ground and principle of the decision apply equally to a bill of foreclosure, the case now under review. There is a still more recent authority in the case of *Hughes v. Kelly*, before the Lord Chancellor of *Ireland*, who is reported to have said that "he had always been of the opinion adopted in *Appleby v. Duke*, and in many cases strongly protested against the old rule." His Lordship accordingly in that case refused the costs of the provisional assignee.

1843.

 APPLEBY
 v.
 DUKE.

Such is the state of the authorities on the subject; the more recent decisions are against the claim, and I think with reason. Why should the mortgagee suffer, or his security be affected, because by the acts of the mortgagor his interest in the mortgaged premises has been assigned to another? The assignee represents the mortgagor: on what ground then can he, consistently with the established principles of this Court, be entitled to costs? It is said that he does not take the assignment by his own voluntary act; that it is cast upon him by operation of law. But he accepts the office to which he knows the assignment to be an incident, and in doing so he must be considered as accepting the assignment. It is said that the case is a case of hardship. If it be so, the legislature must provide the remedy. Unless the legislature shall so declare, the remedy must not be at the expense of the mortgagee. In my view of the question the case is not affected by the state of the insolvent's assets. I am of opinion, therefore, that the appeal ought not to be allowed. (a)

(a) See the next case.

1843.



Jan. 21.

CLARKE v. WILMOT.

An official assignee, made Defendant to a foreclosure suit, as representing the interest of a mesne incumbrancer who had become bankrupt, held not to be entitled to his costs from the Plaintiff, although he disclaimed absolutely at the hearing.

IN this case, which was also a foreclosure suit, a similar question arose as to the costs of the official assignee of a *mesne* incumbrancer who had become bankrupt. The assignee by his answer had stated, that he claimed no other interest than such as the Court should think him entitled to. At the hearing however, he, by his counsel, disclaimed absolutely, and thereupon Vice-Chancellor *Knight Bruce* allowed him his costs. (a)

On appeal from his Honor's decree,

The LORD CHANCELLOR said that the case must follow the decision in *Appleby v. Duke*; and his Lordship accordingly reversed this part of the decree.

(a) See 1 *Y. & Col. N. S.* 53.

1843.

WESTFIELD v. SKIPWITH.

June 1.

IN this case there was an original cause and a cross cause; the former for relief, the latter only for discovery.

After the original cause was at issue and an answer had been put in to the cross bill, the Plaintiff in the original cause obtained an order dismissing his bill, and thereupon the Plaintiff in the cross cause moved before the Vice-Chancellor of *England*, that the Defendant in that cause might pay the costs of it, which motion was refused: the Defendant in the cross cause afterwards obtained an order of course at the Rolls, that the Plaintiff in that cause might pay the costs of the answer.

Mr. *Wakefield* and Mr. *James*, on behalf of the Plaintiff in the cross cause, now moved before the Lord Chancellor, pursuant to leave, to discharge that order for irregularity.

They said that the ground on which the Vice-Chancellor had refused their client's application for the costs of the cross cause was, that the discretion given to the Court by the 41st Order of *August* 1841, respecting the costs of a cross cause, was only to be exercised at the hearing of the original cause. That might be a reason why the Court could not give the Plaintiff in such a bill his costs, where the original suit never came to a hearing: but it did not follow that the Plaintiff was therefore bound to pay the Defendant's costs according to the old practice; for it was clear that the 41st Order had altered the old practice to some extent, inasmuch as

under

Where the Plaintiff in an original cause, after putting in an answer to a cross bill for discovery, dismisses his own bill before the hearing, the Court has not only no power under the 41st order of *August* 1841, to give the Plaintiff in the cross bill his costs, but the Defendant to the cross bill has a right to be paid his costs of the answer by the Plaintiff, according to the old practice.

1843.

WESTFIELD
v.
SKIPWITH.

under that practice, the Defendant to a bill of discovery was entitled to his costs immediately on putting in his answer; whereas, by the 41st Order, that right was suspended until the hearing of the original cause, and was then made subject to the discretion of the Court. The consequence was that, if he did not think fit to bring his cause to a hearing, his right was suspended indefinitely.

Mr. Stuart and Mr. Sidebottom, contra.

Mr. Wakefield, in reply.

The LORD CHANCELLOR.

The persons who framed these orders, were perfectly conversant with the practice of the Court, and they must have been aware that the present circumstances were likely to arise, but they have not provided for them. I must take it therefore that they did not intend to provide for them. They have merely declared that the discretion of the Court shall be exercised at the hearing; and in this case that state of things has not arisen, and cannot now arise. I am of opinion that in such a case the old practice continues.

Motion refused with costs.

1842.

BLUNDELL v. GLADSTONE.

Feb. 10, 11.

1843.

Jan. 13.

THIS was an appeal by two of the Defendants, the co-heirs at law of the testator *Charles Robert Blundell*, from a decree of the Vice-Chancellor of *England*, by which it was declared that the Plaintiff who was the second son of *Joseph Weld*, of *Lulworth*, Esq., and whose original name was *Thomas Weld* (he having taken the name of *Blundell* in conformity with a direction in the will to that effect), was the party beneficially entitled under a devise in trust for "the second son of *Edward Weld* of *Lulworth*, Esq.;" there being no one of the *Weld* family who bore the name of *Edward* except the eldest son of the same *Joseph Weld* of *Lulworth*, whose real name was *Edward Joseph*, though he usually went by the name of *Edward* only, and who resided with his father at *Lulworth*, but was, at the date of the will, unmarried.

After the appeal had been argued before the Lord Chancellor, and had stood a short time for judgment, his Lordship intimated that, as the case involved a question relating to the admissibility of evidence, which was of great importance to the administration of justice, not only in this Court but in courts of law, and as it appeared from the previous argument before him that there was some conflict between the earlier and the later authorities upon the point, he was desirous of having the case re-argued in the presence of two of the common law Judges, by one counsel on each side, as had been done in the case of *Miller v. Travers*. (a)

His Lordship having, in pursuance of this intimation, procured the attendance of Mr. Justice *Patteson*

A devise to the second son of *Edward Weld*, of *Lulworth*, held, upon the context of the will and upon extrinsic evidence as to the state of the *Weld* family and the degree of the testator's acquaintance with the different members of it, to mean a devise to the second son of *Joseph Weld*, of *Lulworth*, although there was a person named *Edward Joseph Weld* (the eldest son of *Joseph Weld*), who resided with his father at *Lulworth*, and who usually went by the name of *Edward* only, and although a former will of the testator, made several years before the will in question, contained a devise to the same *Joseph Weld*, by his right name.

and

(a) 8 Bing. 244.

1842.

BLUNDELL

v.

GLADSTONE.

and Mr. Justice *Maule*, the appeal now came on to be re-argued before him in their presence.

The material clauses of the will and all the other facts and circumstances of the case as they appeared in evidence, are noticed in the following judgment, and being also fully detailed in the report of the argument in the Court below (*a*), it is considered unnecessary to repeat them here. It will be seen, however, by reference to that report, that two former wills of the testator, though commented upon in the argument, were rejected by the Vice-Chancellor as evidence, upon an objection of form. Their rejection constituted a specific ground of the present appeal, and it will be seen from the judgment that, in affirming the decree of the Vice-Chancellor, the Court gave the appellants the benefit of them, without expressing any opinion upon their admissibility in point of form.

The *Solicitor-General*, appeared for the Appellants.

The *Attorney-General*, for the Respondent.

In support of the appeal, it was contended that the description "*Edward Weld, of Lulworth, Esq.*," applied with sufficient accuracy to *Edward Joseph Weld*, (who, as has been already stated, usually went by the name of *Edward* only,) to preclude the admission of any inferences in favour of the Plaintiff, founded either on the contents of the will, or on evidence of extrinsic facts; and secondly, that if such inferences were admissible at all, the utmost effect they could have would be to render the devise altogether void for uncertainty.

The

(*a*) See 11 *Sim.* 467.

The argument on the first point consisted of comments upon the principles and authorities enun-
tiated and collected in Mr. (now Vice-Chancellor) *Wigram's*
Treatise on the Application of Extrinsic Evidence to
the Interpretation of Wills.

1843.
BLUNDELL
v.
GLADSTONE.

The argument on the second point was substantially
the same as appears from Mr. *Simons'* report to have
been used in the Court below.

Mr. JUSTICE PATTESON now delivered the following
judgment.

1843.
Jan. 13.

In this case the Plaintiff, *Thomas Weld Blundell*, filed
his bill against the Defendants, for the purpose of
establishing the will of the late *Charles Robert Blundell*,
and for carrying into execution the trusts thereof. Two
of the Defendants, *Thomas Lord Camoys* and *Elizabeth*
Tempest, are the heirs at law of the testator. Upon
the hearing of the cause before his Honor the Vice-
Chancellor, an issue was directed upon the question of
devisavit vel non, which was tried at *Liverpool*, at the
Summer assizes in 1840, and a verdict found for the
present Plaintiff, in whose favour his Honor the Vice-
Chancellor afterwards made a decree. Against this
decree the Defendants, Lord *Camoys* and Mrs. *Tem-*
pest, have appealed and prayed a rehearing. Upon
the hearing of the appeal, the Lord Chancellor has
been pleased to request the assistance of my brother
Maule and myself, and the case has been argued be-
fore us.

By the will in question, which bears date on the 28th
of *November* 1834, the testator devises certain estates
to trustees, "upon trust to permit and suffer the second
son of *Edward Weld*, of *Lulworth*, in the county of
Dorset,

1843.
BLUNDELL
v.
GLADSTONE.

Dorset, Esq., to occupy and enjoy the same, and to take to his own use the rents and profits thereof, for and during his natural life."

The Plaintiff is the second son of *Joseph Weld* of *Lulworth*, in the county of *Dorset*, Esq., and he claims under this devise as the person therein designated, although his father's name is not *Edward* but *Joseph*; contending that the name "*Edward*" was inserted in the devise by mistake for "*Joseph*." The Plaintiff has an elder brother whose name is *Edward Joseph*. Much evidence was adduced on both sides to shew the state of the family of *Weld* and the names of the different members of it, at the time of the making of the will, and to prove how far the testator was acquainted with them: none of which evidence was objected to as inadmissible; it was indeed objected on the part of the Defendants, that the evidence given by Mr. *John Gladstone* of his conversations with the testator in 1836 and 1837, could not be used as proof of the intention of the testator, or as declarations made by him respecting the person who was the object of his devise; to this objection the learned counsel for the Plaintiff acceded, and proposed not to use them for the purpose of such proof, but as evidence of the testator's ignorance of the name of the second son of *Edward Weld*; and for this purpose they were allowed by the learned counsel for the Defendants to be, and no doubt were, admissible. The case is therefore free from any question as to admissibility of evidence: all that has been received is only what was necessary to put the Court into the same situation with regard to knowledge of extrinsic circumstances as the testator himself was in, and so to enable them the better to put that construction upon his words, which it is to be presumed he himself would have put if asked. So far, at least, such evidence has been uniformly

1843.

BLUNDELL
v.
GLADSTONE.

formly received according to all the authorities, and it is unnecessary to discuss or even to refer to them. The case is one purely of construction, and the Court will have to determine, whether, looking at the whole contents of the will, and having the same information which the testator had when he made it, they can clearly see who was intended to be the devisee, or whether that is left in so much uncertainty that the will must be declared void, and the heirs at law take the estates.

It appears that the testator had made two former wills, one in the year 1821, the other in the year 1827. At both of these times *Lulworth Castle* and estate was in the possession of *Thomas Weld* the elder brother of the family, and *Joseph Weld* the next brother and father of the Plaintiff, resided at *Pilewell* in the county of *Southampton*. In the will of 1821, the testator makes a bequest to *Thomas Weld* of *Lulworth*, and another to *Mr. Joseph Weld* of *Hampshire*, and another to the said *Thomas Weld*, *Joseph Weld*, and their two next brothers. In that of 1827, he devises lands "upon trust for the second son of *Joseph Weld* Esq., the next younger brother of or to the Rev. *Thomas Weld* of *Lulworth*, for life and without impeachment of waste, and from and after his the said *Joseph Weld*'s decease upon trust for his first and other sons severally and successively, according to the priority of their births, and to the heirs male of their bodies in tail-male, and in default of such issue or heirs male upon trust for the third son of the said *Joseph Weld*, (such next younger brother of or to the said Rev. *Thomas Weld*) for life, with like remainders to his first and other sons successively, according to the priority of their births, in tail-male." The words "after his the said *Joseph Weld*'s decease," are manifestly written in mistake for "after the decease of the said


1843.

 BLUNDELL
 v.
 GLADSTONE.

second son of the said *Joseph Weld*," which, however, is not material to the present purpose. From both these wills it is collected, that the testator knew the name of Mr. *Thomas Weld*'s next brother to be *Joseph*, and, from the will of 1827, that having selected the second son of Mr. *Joseph Weld* (the present Plaintiff) as the object of his devise, he knew how to describe him and did describe him accurately.

Subsequently to the latter of these two wills, namely, in 1829, *Thomas Weld* by deed conveyed *Lulworth Castle* and estate to his brother *Joseph* for life, remainder to his first and other sons for life, remainder to their first and other sons in tail, and himself became a professed priest and cardinal of the Roman Catholic Church; whereupon *Joseph Weld* removed to *Lulworth Castle*, and has ever since been and still is the possessor of it. *Joseph Weld*'s eldest son was named *Edward Joseph*: he was commonly known by and used the name of *Edward* only, but in deeds and formal cases used his proper names of *Edward Joseph*. This gentleman was introduced to the testator as the eldest son of Mr. *Weld* of *Lulworth*; subsequently to which introduction and before the will was made, namely, some time in the year 1830, the testator made particular inquiries of Mr. *George Weld*, a younger brother of the Plaintiff's father, respecting the *Weld* family, and who was the possessor of *Lulworth*, and, upon being told that Mr. *Joseph Weld* was the possessor, spoke of having seen his eldest son, and made minute inquiries as to his second son. Upon that occasion he repeatedly called the possessor of *Lulworth* "*Edward*," and though corrected several times, and told that his name was "*Joseph*," and that *Edward Weld* (who was originally the next brother of the cardinal *Thomas Weld*), had been dead some years, yet he persisted in speaking of the possessor of *Lulworth*


worth as "*Edward*." He appears to have seen Mr. *Joseph Weld* once for a few minutes, and Mr. *Edward Joseph* two or three times; but had no further personal acquaintance with either of them, and being resident in *Lancashire*, whilst they resided in *Dorsetshire*, he heard but little about them.

1843.

 BLUNDELL
 v.
 GLADSTONE.

Under these circumstances the will of 1834 was made, and the question is whether the testator has by his will sufficiently expressed an intention that the Plaintiff should take a beneficial interest in the property in dispute.

It was contended for the heirs at law that *Edward Joseph Weld* fully and accurately answered the whole description of "*Edward Weld of Lutworth, Esquire*;" and therefore that the Court was not at liberty to substitute any other name upon a conjecture of some mistake: that if, indeed, there had been two persons, each fully and accurately answering the whole description, evidence might be received, or arguments from the language of the will and from circumstances might be adduced, to shew to which of these persons the will applied; but that where one person, and one only, fully and accurately answers the whole description, the Court is bound to apply the will to that person.


Such may be conceded to be a general rule of law and of construction, inasmuch as it in general will be found to assist in attaining the object of all rules of construction — the discovery of the intention of the testator as expressed by his will — though a rule not without the possibility of an exception; for, if a case should arise in which this rule would lead to a construction of a devise manifestly contrary to what was the intention of the testator as expressed by his

1843.

 BLUNDELL
 v.
 GLADSTONE.

will, the rule must be rejected as inapplicable to a case in which it would defeat instead of promoting the object for which all rules of construction are framed. But in this case *Edward Joseph Weld* is not brought within that rule; for he does not fully and accurately answer the whole description. It is true that being known by and using the name of *Edward* only, he might, if there were no person whose real name was *Edward Weld* only, take by that description; but he would not so take, because he fully and accurately answered the whole description, but because there being no person who did so answer, he came the nearest to it. Evidence of two facts would be necessary to enable him to take — first, the fact that no person of *Lulworth* existed bearing the name of *Edward Weld* only; and, secondly, that he himself, although his real name was *Edward Joseph*, was known by and used the name of *Edward* only. The necessity for having such evidence clearly shews that he does not fully and accurately answer the whole description: and if so, another rule of construction applies, namely, that if the name be wrong but the description right, and no person fully and accurately answers the name, the Court may apply the devise to the description. Now, in this case, the name is wrong, strictly speaking, because there is no person of the name of *Edward Weld* only. The description “of *Lulworth*, Esquire,” would seem to be more applicable to the possessor of *Lulworth*, than to his eldest son; but, conceding that it is equally applicable to both, then by the first rule of law and construction, arguments may be adduced to shew to which of the two persons answering that description the will applies.

One argument, and that a very forcible one, is, that in the subsequent limitations of the same estates contained in the will in question, Lady *Stourton* is described as the sister of *Edward Weld* of *Lulworth*, and the
 estate

estates are given to her second son after failure of the male issue of all the brothers of *Edward Weld*, except the eldest. Now Lady *Stourton* was the sister of *Joseph Weld*, and *Joseph Weld* had an elder brother, whereas she was not the sister of *Edward Joseph Weld*, nor had *Edward Joseph Weld* any elder brother.

1843.

 BLUNDELL
 v.
 GLADSTONE.

Again, the devise to permit and suffer the second son of *Edward Weld* "to occupy and enjoy the same, and to take to his own use the rents and profits thereof," coupled with other directions in the will as to taking the name and arms of *Blundell*, makes it most probable that the first object of the testator's bounty was a person in *esse* at the time of the making of the will. Now at that time *Joseph Weld* had three sons, but *Edward Joseph Weld* was unmarried. Again, it is plain that the testator wished to prefer the male line as much as possible; accordingly, upon failure of the sons of *Edward Weld* except the eldest, and their issue male, he devises the estate to the sons of the brothers of *Edward Weld*, and not till they are exhausted to the second son of Lady *Stourton*. If "*Edward*" mean "*Joseph*" in the will, none of the males except the eldest son and brother of *Joseph*, and their sons, will be excluded; but if "*Edward*" mean "*Edward Joseph*," all the male descendants of Lady *Stourton*'s brothers, of whom there are many, would be excluded and her son take in preference to them, manifestly against the testator's intention.

To these arguments drawn from the will itself, and the state of the family as known to the testator, nothing is opposed but the conclusion drawn from the wills of 1821 and 1827, namely, that at those times the testator was aware that the Cardinal *Thomas Weld*'s next brother's name was *Joseph* and not *Edward*, *Edward* having died at college in the year 1796, and the argument

1843.

 BLUNDELL
 v.
 GLADSTONE.

raised thereon that, having the will of 1827 before him in 1834, he could hardly be ignorant at that time that the name of Cardinal *Thomas Weld*'s next brother was *Joseph*, and must therefore have intended some other person by the description of "*Edward Weld of Lulworth, Esquire.*" It is answered that he was under the mistaken impression that the name of the possessor of *Lulworth Castle* was *Edward*, and that in the will in question he plainly intends to devise to the second son of the possessor of *Lulworth*, whom he calls *Edward*, without reverting to the degree of relationship in which that possessor stood to the Cardinal *Thomas Weld*, or noticing whether he was or was not the same person to whose second son he had devised by the previous will of 1827.

We do not think it necessary to enter into an examination of any of the numerous cases cited upon the argument before us; for they establish without doubt that if there be a mistake in the name of the devisee but a right description of him, the Court may act upon such right description; and further, that if two persons equally answer the name or description, or both, the Court may determine from the rest of the will and the surrounding circumstances to which of them the will applies. Now here there is certainly a mistake of the name, there being no such person as *Edward Weld of Lulworth, Esquire*: two persons, namely, *Joseph Weld of Lulworth, Esq.*, and *Edward Joseph Weld of Lulworth, Esq.*, equally answer the description: the Court therefore may determine to which of them the will applies.

Looking to the state of the family and the knowledge which the testator had of them, and carefully considering the words and provisions of the will itself, my brother *Maule* and myself are fully satisfied that the testator
 did

did in the devise in question use the word "*Edward*" by mistake for "*Joseph*," and that the Plaintiff is the person designated by the devise as the second son of *Edward Weld of Lulworth, Esq.*, and is entitled to the estates thereby devised.

1843.
BLUNDELL
v.
GLADSTONE.

The LORD CHANCELLOR.

We are much obliged to the learned Judges for their assistance on this occasion, and for the attention they have paid to this question. I entirely concur in the opinion which they have so clearly and so fully expressed. The main argument upon the part of the Defendant rested on the assumption of a fact, namely, that the eldest son of *Joseph Weld of Lulworth* was properly described, or rather might be considered as properly described by the name of *Edward Weld of Lulworth*, whereas his name was *Edward Joseph Weld*. This fallacy being removed, and there appearing to be no person accurately answering the description of *Edward Weld of Lulworth*, it is open to us to look to the rest of the will for the purpose of ascertaining, if possible, whom the testator meant by the description "*Edward Weld of Lulworth*;" and I am clearly of opinion, advert- ing to the different passages of the will that have been referred to by my learned brother, especially that passage which relates to the devise to the sons of Lady *Stourton*, that it was the intention of the testator, by the designation of "*Edward Weld of Lulworth*," to describe *Joseph Weld of Lulworth*, who was at that time the possessor of *Lulworth Castle*. It follows, therefore, that *Thomas Weld*, the Plaintiff, takes under this devise, and that the decree of the Vice-Chancellor must be affirmed. It is proper, I should add, in a case of this description, after the various arguments it has undergone, that the costs should come out of the estate.

1843.

Nov. 22.

Dec. 15.

WALSH v. GLADSTONE.

Where a legacy was given by a will to *A. B.*, "to be applied to the use of" a certain Catholic College, and *A. B.* died in the testator's lifetime, the Court on being satisfied of the respectability and permanent character of the institution, ordered the legacy to be paid to the President of the College, who was the officer intrusted with the management of its pecuniary affairs, without requiring any scheme to be settled, although the Attorney-General asked for one.

THE testator, *Charles Robert Blundell*, by his will, dated the 28th of *November 1834*, gave, amongst other bequests "a sum of 4000*l.* to the Rev. *Thomas Robinson*, to be applied to the use of *Ampleforth College* in *Yorkshire*."


A sum of stock sufficient to answer this legacy having been carried over to a separate account, a petition was presented by the Rev. *Thomas Cockshott*, stating that *Ampleforth College* was a seminary or college which had existed since the commencement of the present century, for the education and instruction of persons professing the *Roman Catholic* religion: that it was under the direction and government of an officer called the president: and that the president for the time being had the absolute control and management of the revenues and property of the college, and was alone entitled to receive and give receipts for the same, and to conduct and manage the expenditure of the college; and that all gifts heretofore made to the college, or for the benefit thereof, had been paid to that officer; and praying that the legacy in question might be paid to the petitioner as the present president of the college, the Rev. *Thomas Robinson* having died in the lifetime of the testator.

The Vice-Chancellor having, upon affidavits verifying the above statements of the petition, made an order for payment of the legacy to the petitioner, the Attorney-General appealed from that order.

The appeal petition now coming on to be heard,

Mr.

Mr. *Wray*, in the absence of Mr. *Twiss*, for the Attorney-General, contended that so large a sum ought not to be paid to an individual calling himself president of the college, without a reference to the Master to approve of a scheme for its application, or at least some inquiry into the nature and objects of the institution. If the testator had himself made choice of the president as the hand to receive the money, or if he had given it directly to the college, it would have been different; but where, by the death of the trustee selected by the testator, the execution of a trust devolved upon the Court, the invariable course was to refer it to the Master to approve of a scheme for the application of the fund.

1843.

 WALSH
 v.
 GLADSTONE.

Mr. *Tinney* and Mr. *Fleming*, for the President of the College, insisted that where there was a subsisting charity, and an officer capable of giving a discharge for a legacy, the Court was in the habit of ordering payment to be made to that officer without directing a scheme.

The LORD CHANCELLOR.

Whether a scheme should be directed or not will depend upon the information I may have as to the nature of the institution and the situation of the officer. If there are already existing funds belonging to the institution, and if the president who has the management of those funds is appointed for life, so as to give him a permanent character, the legacy may perhaps be paid to him without referring it to the Master to settle a scheme. But, suppose the president held his office by a precarious tenure — by an appointment from year to year, for instance—and that the institution was supported by voluntary contributions, then it might be right that a scheme should be settled. If there is a character of
 permanence

1843.

 WALSH
 v.
 GLADSTONE.

permanence in the institution, and in the situation of the officer, the Court will hand it over to him without a scheme, as was done lately in the case of the *Venice* charity. (a) Where a testator, who is a *Roman* Catholic, leaves money for the use of a *Roman* Catholic establishment, all I have to do is to see that it is applied to the use of that establishment, and that it is paid into hands in which it will be safe. I have nothing to do with the internal management, discipline, and mode of education in such an institution. I should wish, however, before I dispose of this petition, to have some more precise information than the present affidavits afford, respecting the nature of this institution, and the situation and character of the president.


Dec. 15.

The appeal petition having stood over for further affidavits to be filed, now came on again.

It appeared from the further affidavits, that the college had been established in 1802, as a continuation of a similar institution which had existed in *France* for several centuries, but which had been broken up during the Revolution. That its object was the education of *Roman* Catholic laymen as well as ecclesiastics: that the governors of the college consisted of persons, who having been educated there, had afterwards been admitted to Holy Orders; and that the president, who was elected every four years by the governors for the time being, was also treasurer of the college, and had the management of its pecuniary concerns, for which he was accountable to an auditor. It also appeared that the testator was well acquainted with the college and the system of its management, and that in 1830 he had
 made

(a) *Cockburn v. Raphael*, L. C. May 9th, 1842. on appeal, not reported.

made a present of 500*l.* to it through the medium of the Rev. *Thomas Robinson* (the person mentioned in the will), by whom the same was paid to the then president.

1843.

 WALSH
 v.
 GLADSTONE.

There were also affidavits made by several *Roman Catholic* peers who had been educated at the college, testifying to the respectability of the president, and the permanent character of the institution.

Mr. *Tinney* and Mr. *Fleming* having read the affidavits,

Mr. *Twiss* and Mr. *Wray* again submitted, that as the trustee named by the testator was to apply the fund, and that trustee was dead, a scheme ought to be directed.

The LORD CHANCELLOR.

It may be that Mr. *Robinson*, if he had been living, would have had a discretion as to the application of the fund: but it would have been a fair exercise of that discretion to have paid it over to the president; and, if I am of opinion that it will be safe in his hands, the Court will be justified in doing the same. Now I think it is quite clear from the affidavits, that the money will be safe in the hands of the president, and if that be so, how can it be better applied for the use of the college than by paying it to the individual who has the management of the general affairs of the institution? The order therefore is right, being exactly in the terms of the testator's will, only substituting the president for the Rev. *Thomas Robinson*.

The appeal petition was dismissed, and the costs of all parties ordered to be paid out of the fund.

1843.

March 31.
Nov. 4.

WALSH v. GLADSTONE.

A testator drew two cheques on his banker in favour of two of his servants, with a direction that they should be presented after his death, and about a year afterwards made a formal will, in which amongst other dispositions he gave two annuities to the same persons, and all the residue of his personal estate to certain other persons, and revoked all former wills. After his death all the three instruments were admitted to probate as constituting his last will. Held, that by reason of the probate this Court was bound to treat the sums for which the cheques were drawn as legacies, but that as such they were constructively, if not expressly, revoked by the will.

IN the administration of the estate of *Charles Robert Blundell*, the testator in the cause, a sum of 1200*l.* consols was carried to a separate account, intituled "The Cheque Legacy Account;" to abide the result of a question raised by the residuary legatees as to the operation and effect of two cheques signed by the testator in his lifetime, in favour of his butler and housekeeper, and which had been admitted to probate by the Ecclesiastical Court as part of his will. (*a*)


The Vice-Chancellor of *England*, upon the petition of the residuary legatees, ordered the fund to be transferred to them. This was an appeal from that order.

The facts upon which the question arose were, in substance, as follows:—The testator some time before his death delivered to his butler, *William Hall*, two sealed packets addressed to his bankers, with directions to retain them until after his death, and then to present them at the banking house. On one of the packets was written "To be delivered by *William Hall*." On the other, "To be delivered by *Ann Harris of Ince*." Shortly after the testator's death, the packets were delivered to the Defendant, the executor, by *William Hall*, and were opened in his presence at the banking house.

(*a*) The words of the Probate Act were, "The last will and testament of *Charles Robert Blundell*, as contained in Paper Writ-

ings marked *A.*, *B.*, and *C.* [*B.* and *C.* being the cheques,] was proved, approved, and registered.

house. One of the packets was found to contain a cheque in these terms: —

1843.

 WALSH
 v.
 GLADSTONE.

“ *Liverpool, September 11th, 1833.*

“ *Messrs. Arthur Heyward and Sons and Company.*

“ *On demand, pay William Hall of Ince, butler of this place, 500l.*


Charles Blundell.”

In the other there was a similar cheque in favour of *Ann Harris* for 300l. In the month of *November 1834* the testator made his will, in which, after a particular disposition of his personal property, and the gift of several legacies and annuities, and amongst others, an annuity of 200l. a year to *William Hall*, and another of 60l. a year to *Ann Harris* for their respective lives, he proceeded thus: — “ And subject as aforesaid, and except as hereinafter mentioned, I give and bequeath all the residue and remainder of my personal estate and effects whatsoever and wheresoever unto ” &c. [naming his residuary legatees.] The only disposition contained in the subsequent part of his will consisted of certain legacies to his executors on condition of their accepting the office. After which followed this clause, “ And, lastly, I do hereby revoke any former will or codicil by me at any time made, and declare this to be my last will and testament.”

In addition to these facts, which appeared from the Master's report, it was stated at the bar, by the counsel for the Appellants, and not disputed, that by a previous will which was existing and in force at the time when the cheques were signed and delivered to *William Hall*, the testator had bequeathed to him an annuity of 100l. a year.

The appeal now coming on to be heard,

Mr.

1843.

WALSH
v.
GLADSTONE.

Mr. *Roupell* and Mr. *Rolt*, for the Appellants, said, that as the cheques had been admitted to probate as testamentary papers, there could no longer be any question as to whether they were revoked by the death of the drawer. This Court could look at the sums mentioned in them only as legacies: and if they were not to take effect as such, it must be on the ground that they were revoked either expressly or virtually by the subsequent will.

Upon that point, they contended first, that questions of total revocation were within the exclusive jurisdiction of the Ecclesiastical Court, whose province it was to decide what instruments a testator's will consisted of; for which purpose that Court took cognizance of virtual or constructive, as well as of express, revocation: and, accordingly, if any document propounded for probate appeared to have been altogether revoked, whether in express terms or by implication only, by one of subsequent date, that Court would not admit it; *Methuen v. Methuen*.^(a) It was true that this Court, in construing a will, often took upon itself to decide that some part of the dispositions contained in a testamentary paper was revoked or some other disposition substituted for it, by one of subsequent date, which it clearly might do without putting itself in conflict with the Ecclesiastical Court, because that Court in admitting a paper to probate, merely decided that it formed part of the testator's will, and not that every disposition contained in it was necessarily to take effect. But it was difficult to conceive how this Court could hold that the whole of a testamentary paper was inoperative, without contravening the decision of the Ecclesiastical Court, after that Court had admitted it as a subsisting part of the will.

Assuming,


(a) 2 *Phill.* 415.


Assuming, however, that it was competent for this Court to do so, it remained to consider whether, treating these three papers as what the Ecclesiastical Court had pronounced them to be, not a will and two codicils, but as constituting together one will, this Court could, according to its own principles of construction applicable to such a case, come to the conclusion that the two first in point of date had been revoked or superseded by the third. The Vice-Chancellor had treated the case as one of express revocation, relying upon the revocatory clause; but that could not be; *Denny v. Barton (a)*; because that clause related in terms to former wills only, whereas this Court was bound by the Probate Act to consider all these instruments as parts of the same will. And whether they were regarded as one instrument or as three, it was equally impossible, consistently with the established rules relating to cumulative gifts, to hold that where a testator gave first a gross sum, and then an annuity to the same person, the latter could be taken as a substitution for the former, particularly when it appeared that a former will, containing a like annuity to one of the parties, was subsisting and unrevoked at the time when the cheques were given.

Mr. *Stuart* and Mr. *Fleming*, for the residuary legatees, cited *Miller v. Miller (b)*, to shew that a cheque could not take effect as a *donatis mortis causa*, and they said there was no case in which such an instrument had ever been allowed to operate as a legacy. But supposing that question to have been concluded by the probate, and that all the three instruments were to be taken as constituting the last will; still it was for this Court to construe their contents, and they contended that it was impossible to read the last of them, and particularly the residuary clause of it, without coming to the conclusion

(a) 2 *Phill.* 575.

(b) 3 *P. Wms.* 556.

1843.

 WALSH
 v.
 GLADSTONE.

1843.

 WALSH
 v.
 GLADSTONE.

clusion that it contained the final disposition of the testator's property, and that he intended the annuities to be a substitution for the cheques; it was a case in which the last instrument afforded intrinsic evidence of its being intended to supersede the former ones; *Campbell v. The Earl of Radnor* (a), *Barclay v. Wainwright* (b), *Coote v. Boyd* (c), *Attorney-General v. Harley* (d), *Fraser v. Byng*. (e)

Mr. *Roupell*, in reply, said that no argument could be founded on the residuary clause of the will, which would not have been equally applicable had that instrument contained no gift at all to the Appellants: and it could hardly be contended that in that case it would have operated as a revocation of the cheques.

Nov. 4.

The LORD CHANCELLOR after stating the facts as they are above stated, proceeded as follows: —

The question is, whether *William Hall* and *Ann Harris* are entitled to receive from the testator's estate the respective sums of 500*l.* and 300*l.* for which the cheques were given. These papers have been admitted to probate as a part of the testator's will by the Ecclesiastical Court, the tribunal which has exclusive jurisdiction in such questions. The sums must, therefore, be considered by this Court as legacies bequeathed by the testator, and the only point for consideration is whether they were revoked by the will made in the following year, and by which annuities were given to the same persons. This is a question of construction, which it is within the competence of this Court to determine, notwithstanding

(a) 1 *B. C. C.* 271.


(b) 3 *Ves.* 462.

(c) 2 *B. C. C.* 521.

(d) 4 *Mad.* 263.

(e) 1 *R. & M.* 90.

notwithstanding the probate granted by the Ecclesiastical Court: *Campbell v. The Earl of Radnor* (a); in which case it was declared that the first codicil, which had been admitted to probate, was to be considered as virtually revoked by the second. See also *Gawler v. Standerwick*. (b)

1843.

 WALSH
 v.
 GLADSTONE.

By the will executed in *December* 1834, the testator provides for *William Hall* and *Ann Harris*, by giving an annuity of 200*l.* a year to *William Hall* and an annuity of 60*l.* a year to *Ann Harris*. After bequeathing several other annuities and legacies, he gives all the residue and remainder of his personal estate, subject to the bequests mentioned in his will, and to these bequests only, to the persons therein named, as his residuary legatees. This in terms excludes all previous testamentary dispositions of his personal estate, and there is no sufficient reason to suppose that he did not intend it should so operate, as he had provided liberally for the two servants *Hall* and *Harris* by this very instrument.

Some argument appears to have been built upon the circumstance, that by a previous will of 1827, an annuity of 100*l.* a year had been given to *Hall*, and that the cheque for 500*l.* had also been given to him while this will remained unrevoked, and that it was the intention, therefore, of the testator that he should take both the legacy and the annuity. It is however quite consistent with this previous intention, that he should afterwards have thought it better to substitute the additional 100*l.* a year for the sum mentioned in the cheque. Even supposing it to have escaped his recollection (which is not very probable), that he had given these cheques, yet

(a) 1 *Bro. C. C.* 271.

(b) 2 *Cox*, 16.; see p. 19.

1843.


WALSH
v.
GLADSTONE.

yet if he intended when he executed his will that all his personal estate not expressly disposed of by that instrument should, as he there directs, go to his residuary legatee, that would I think be sufficient to exclude this claim.

It further remains to be observed, that by the concluding clause of the will the testator expressly revokes all former wills or codicils, and declares that to be his last will and testament. This indeed is not absolutely conclusive, but it would require very strong evidence of the testator's intention that the revocation should not extend to the testamentary gifts in question, to justify the Court in excluding them from its operation. I think there is no such evidence in this case, and agreeing, therefore, as I do with the opinion expressed by the Vice-Chancellor, the judgment must be affirmed.

The costs of all parties must be paid out of the cheque legacy account, or, in other words, out of the residue of the personal estate.

See *Heming v. Clutterbuck*, 1 *Bligh*, N.S. 479.; and *Brine v. Ferrier*, 7 *Sim.* 549.

1842.

CAMPBELL v. BROWNRIGG.

1842.

Dec. 21.

1843.

Jan. 12.

Oct.

THE will of *Lionel Hook*, dated 21st of *February* 1806, was partly as follows: —

“ I give and bequeath to my daughter *Isabella Hook*, now residing with me at *Fort William*, in *Bengal*, the sum of 50,000 *Sicca Rupees*, to be employed for her use in the following manner, viz.: the principal of the said sum is to be vested in paper of the *East India Company*, bearing interest at 8 per cent.; or, in stock in the *English* government funds, should such a manner appear to my executors advisable and proper; in either case the interest accruing on the said principal sum is to be regularly paid to my said daughter, to be used and appropriated in whatever manner she shall think proper. It is my intention and desire, that the said interest shall be regularly paid to my said daughter during her lifetime; in the event of her marriage, and of her having a child or children, the aforesaid principal sum of 50,000 *Sicca Rupees* is to become the property of her child or children equally to be divided amongst them, or should there be only one child, then the whole is after the death of my said daughter to become the property of that child. It is however my will and intention, that the interest on the whole of the principal of the said sum shall be regularly paid to my said daughter during her life, whether she shall marry or otherwise.” — The testator then gave certain pecuniary legacies to his niece *Harriett Fraser*, and his cousin *Mrs. M'Gregor*, and several other persons, and proceeded thus: — “ It is my further will and desire, that the whole of the remainder of my property of every kind be equally divided between my daughter *Isabella*

Under a gift of a sum of money “ to my daughter *J. H.*, to be employed for her use in the following manner;” accompanied by a direction that the fund should be invested and the interest only paid to the daughter during her life, and in case she should marry and have children, then the principal to be divided amongst such children. Held, upon the construction of the whole will, the daughter having died without children, that her personal representative, and not the residuary legatee, was entitled to the fund.

1842.


 CAMPBELL

v.

BROWNRIGG.

Hook, my sister *Mrs. Charles Fraser*, and my brother *Charles Hook*, share and share alike."

By a codicil dated the 13th of *September* 1807, the testator, after giving certain directions relative to a legacy of 10,000 rupees contained in the will, expressed himself as follows : —

"It is my further will and desire, that the sums respectively bequeathed by my last will above recited to my daughter *Isabella Hook*, my sister *Mrs. Charles Fraser*, my brother *Charles Hook*, my niece *Harriett Fraser*, and my cousin *Mrs. M'Gregor*, shall in the event of the death of either of the parties before my death, become the joint property of my daughter *Isabella Hook*, my sister *Mrs. Charles Fraser*, and my brother *Charles Hook*, or the survivor or survivors of them, share and share alike."

Isabella Hook survived the testator and married, but had no children. Upon her death a question arose, whether a sum of stock, representing the 50,000 *Sicca Rupees*, belonged to her personal representative, or to the residuary legatees.

The Vice-Chancellor of *England* having decided in favour of the latter, the personal representative of *Isabella Hook* appealed from that decision.

The appeal was twice argued by,

Mr. Teed and *Mr. Elderton*, for the appellants.

Mr. Bethell and *Mr. Vansittart Neale*, for one of the residuary legatees.

Mr. Lowndes, for another residuary legatee.

Mr.

Mr. *Hall*, appeared for the executor, but took no part in the argument.

1842.

 CAMPBELL
 v.
 BROWNRIGG.

In support of the appeal it was insisted, that the gift was in the first instance an absolute gift to the daughter herself, which could not be cut down by construction to a life interest, unless an intention to that effect could be clearly collected from other parts of the will; and that the only object of the subsequent modification of the gift in this case was to secure a provision for the daughter's children in case she should have any.

On the other hand it was argued, that there was in fact, no absolute gift in the first instance, but that the whole clause was to be read together, and then it amounted to the same thing, as if the testator had said "I give 50,000 Sicca Rupees to be applied so and so."

The cases cited were *Harrison v. Foreman* (a), *Whitell v. Dudin* (b), *Comber v. Graham* (c), *Ring v. Hardwick* (d), *Smither v. Willock* (e), *Sturgess v. Pearson* (g), *Campbell v. Harding*. (h)

The LORD CHANCELLOR gave his judgment in writing, during the long vacation.

After stating the substance of the clause in the will, it proceeded thus: — "*Isabella Hook* the daughter, having died without ever having had a child, the question, whether her personal representatives are entitled to the 50,000 Sicca Rupees invested according to the directions of the testator, or whether this money goes to

(a) 5 *Ves.* 207.

(b) 2 *J. & W.* 279.

(c) 1 *R. & M.* 450.

(d) 2 *Beav.* 352.

(e) 9 *Ves.* 253.

(g) 4 *Madd.* 411.

(h) 2 *R. & M.* 390.

1842.

CAMPBELL

v.


BROWNRIGG.

to his residuary legatees. I think the personal representatives of the daughter are entitled to the fund.

The testator gives and bequeathes to his daughter 50,000 Sicca Rupees: it is to be employed for her use; and he directs in what manner it shall be so employed. It is to be invested by his executors. She is to receive the interest during her life. If she has children they are to divide the principal between them after her death. This is the manner in which the legacy given to his daughter is to be employed for her use. There are no further directions. To this extent the use is controlled, but no further. She takes the gift subject to this restriction: when that ceases, it becomes, or rather remains, by virtue of the gift her absolute unfettered property. Such then is the construction I put upon the bequest, and if I am right in this interpretation, the fund, upon the facts stated, belongs to the petitioner.

This view of the case derives, I think, some confirmation from other parts of the will and of the codicil. After giving pecuniary legacies to several other persons, he proceeds as follows: "It is my further will and desire, that the whole of the remainder of my property of every kind be equally divided between my daughter *Isabella Hook*, my sister, *Mrs. Charles Fraser*, and my brother *Charles Hook*, share and share alike." The testator having previously enumerated several specific sums, when he speaks of the remainder of his property, the natural interpretation is, the remainder exclusive of these specific sums, which would lead to the conclusion that he considered he had disposed of them absolutely. The testator also in the codicil thus expresses himself. "It is my further will and desire, that the sums respectively bequeathed by my last will above recited,

recited, to my daughter *Isabella Hook*, my sister Mrs. *Charles Fraser*, my brother *Charles Hook*, my niece *Harriett Fraser*, and to my cousin Mrs. *M'Gregor*, shall in the event of the death of either of the parties before my death, become the joint property of my daughter *Isabella Hook*, my sister Mrs. *Charles Fraser*, and my brother *Charles Hook*, or the survivor or survivors of them share and share alike." He speaks of all these legacies (*Isabella Hook's* among the rest) as sums bequeathed, as sums absolutely disposed of, and directs how they shall be appropriated in the event of a lapse by any of the legatees dying in his lifetime, but provides for no other event.

1842.

 CAMPBELL
 v.
 BROWNRIGG.

Entertaining the impression which I have thus stated as to the proper construction of this will, I must, but with sincere respect for the opinion of the Vice-Chancellor, allow this appeal.

1842.

April 24.

May 3, 4.

June 29.

1843.

Feb. 11.

Whether the protection given by the statutes 6 Ann. c. 51., and 14 G. 3. c. 78. to a party in whose house or on whose estate "a fire shall accidentally begin," extends to fires occasioned by the negligence of the owner or his servants, or whether it is confined to fires arising from pure accident in the limited sense of the word.

Quære?

A petition of right does not lie to recover compensation from the Crown for damage to the property of an individual, occasioned by the negligence of the servants of the Crown.

The reigning Sovereign is not liable to make compensation for


damage to the property of an individual, occasioned by the negligence of the servants of the Crown in a preceding reign; nor, *semble*, even where such damage has been done in his own reign.

VISCOUNT CANTERBURY v. THE ATTORNEY GENERAL.

THIS was a Petition of Right, in which the petitioner, Viscount *Canterbury*, claimed compensation from the Crown for damage alleged to have been done, in the preceding reign, to some property of the petitioner, while Speaker of the House of Commons, by the fire which, in the year 1834, destroyed the two Houses of Parliament.

The petition was presented in the year 1840, and was delivered by Her Majesty to the Lord Chancellor (Lord *Cottenham*) with the usual endorsement, "Let right be done." An application was then made to his Lordship that a commission might issue to enquire of the truth of the allegations in the petition. That application was opposed by the Attorney-General (Sir *John Campbell*), who insisted that the issuing of such a commission was not a matter of right, but of discretion; and after going at considerable length into the merits, for the purpose of showing that even if the facts stated in the petition should be found to be true, the claim of the petitioner was liable to various insuperable objections in point of law, he submitted that the case was one in which the Lord Chancellor would be justified in stopping the proceedings in *limine* by refusing a commission. To that, however, it was replied that the Queen's mandate endorsed upon the petition had made it the duty of the Lord Chancellor to put the claim in a proper train of investigation, and, for that purpose, to give the petitioner a record upon which

which a writ of error would lie (a) ; and, therefore, that unless the Attorney-General was willing “ to confess the suggestions of the petition,” and take issue upon it by general demurrer, a commission was as much a matter of right in a proceeding of this nature as an original writ was in a litigation between subject and subject.

1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

On the conclusion of the argument,

The LORD CHANCELLOR reserved his judgment, observing, however, that from searches which he caused to be made in reference to the late case of the Baron *de Bode*, in which a similar point had been raised by the Attorney-General, and which was then standing for judgment, he had ascertained that there was no case to be found in which the Chancellor had refused to direct proceedings upon a Petition of Right.


April 24.

His Lordship having on a subsequent day intimated his intention to issue a commission, it was arranged that as there was no substantial dispute as to the facts, the statements of the petition should be modified in such a manner as to enable the Attorney-General to meet it by a general demurrer.

The petition was accordingly amended. The case made by it as so amended was, in substance, as follows:—


That on the 16th of *October* 1834, the petitioner, as Speaker of the House of Commons, occupied a house forming part of the Royal Palace at *Westminster*, and communicating internally with the other parts thereof, the said house having, by a royal message from his late Majesty King *George* the Third to the House of Commons in the year 1794, been appropriated to the use of

(a) *Bac. Abr. Prerog.* p. 476.

1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

of the Speaker, and having ever since been occupied, in pursuance of such appropriation, by the Speaker for the time being as his official residence: that during that period it had from time to time been repaired at the public expense by grants of money voted by Parliament for the purpose; but that the occupation of it by the Speaker had always been permissive merely and subject to resumption by the Crown at its pleasure; and that, in one instance, which occurred in the year 1821, when the petitioner was also Speaker, his late Majesty King *George* the Fourth having occasion for the use of the house, the petitioner and his family had, by the command of his Majesty, quitted it for two days during which it was occupied exclusively by his Majesty and his suite. That on the 16th of *October* 1834, a certain room in the said palace, also forming part thereof, being about to be fitted up for the use of the Court of Review, which had then recently been established, a quantity of old sticks, called tallies, which had been formerly used at the receipt of the Royal Exchequer, and were then deposited in the said room, were ordered to be removed and burnt; and that certain persons being servants of, and acting under the authority of the Commissioners of Woods and Forests, who had the ordering and superintendence of all repairs and works required to be done at the palace, for the purpose of consuming the tallies, placed them in the stoves used for warming the House of Lords, which also formed part of the said palace, and communicated internally with the other parts of it; “but that they so placed them negligently, carelessly, and improperly, and in such excessive and improper quantities, that by means thereof the stoves became overheated, and caused a fire to break out in the House of Lords, and which extended to other parts of the palace, including the Speaker’s House, whereby divers articles of furniture, books, prints, plate, and other effects

effects of the petitioner which he had there deposited for the necessary and convenient occupation of the house by himself and his family, to the value of about 7000*l.* were burnt and destroyed, and the rest to the value of 3000*l.* were greatly damaged."

1842.

 Viscount
 CANTERBURY
v.
 The
 ATTORNEY-
 GENERAL.

The petition prayed that the Attorney-General, being attended with a copy thereof, might be required to answer the same: and that the petitioner might thenceforth prosecute his complaint therein, as might be necessary against the said Attorney-General as representing the rights and interests of her Majesty, and also against such other persons, if any, and in such other manner as need might require: and that, for that purpose, he might, if necessary, have leave to make the Attorney-General and such other persons parties thereto, and to pray such relief in the premises as under the circumstances should be just.

To that petition the Attorney-General put in a general demurrer; which now came on to be argued.


May 3.

The *Attorney-General*, Mr. *Twiss*, and Mr. *Waddington*, and Mr. *Wray*, appeared in support of the demurrer.

Sir *Thomas Wilde*, and Mr. Serjeant *Manning*, for the petition.

The argument turned upon the following questions:—

1. Whether the protection given by the statutes of 6 *Ann. c.* 31. 56., and 14 *G. 3. c.* 78., to a party in whose house, or on whose estate a fire should accidentally begin, extended to fires caused by the negligence of the owner or his servants, or whether it was confined

1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

confined to fires arising from pure accident in the limited sense of the word.

The details of the argument on this point are so fully stated in the judgment, that it is unnecessary to repeat them here. The authorities cited were, *Beaulieu's Case* (a), *Snagg's Case* (b), *Turbervill v. Stamp* (c), *Vaughan v. Menlove* (d), *Shaw v. Robberds* (e), 1 *Black. Com.* 431. Incidentally, however, to this point it was contended in support of the demurrer, that upon the petitioner's own statement, he must be taken to have been a gratuitous occupant of the Royal Palace, and that the owner, even of a private house, was under no liability to his guests, any more than to his servants, for accidents of this nature. On the other hand it was insisted, that the permission to occupy the house in question, was to be considered part of the Speaker's salary; and that, even if it were not so, the confidence implied in the relation of host and guest imposed upon the former a peculiar obligation to use such care and caution as to secure the latter from injury.

2. Whether, even assuming that the parties whose negligence caused the fire were the servants of the Crown (for it was insisted that they were the servants of the Commissioners of Woods and Forests, and not of the Crown), the Sovereign was responsible for the consequences of their negligence.

The argument on this point turned chiefly upon the meaning of the legal maxim, that the King can do no wrong; it being contended in support of the demurrer, that that maxim applied to civil torts as well as to criminal acts, and that the meaning of it was, that the Crown was, by virtue of its prerogative, exempt from all imputation

(a) *Y. B. 2 H. 4.* 18. pl. 5.


(d) 4 *Scott*, 244.

(b) *Cro. Eliz.* 10. pl. 5.

(e) 6 *Ad. & Ell.* 75.

(c) 1 *Salk.* 13.

imputation of, and consequently from all liability for, wrongs committed by its servants in the discharge of their duties; that, as a consequence of that principle, it had been laid down, that the King could not, in his own person, arrest a subject, though his servant might, because if the arrest were wrong the subject could not have his action, whereas the servant was liable, though the act were done in the presence of the King and by his authority. (a) That, but for such prerogative exemption of the Crown, claims of this kind would be of common occurrence, as in the familiar instance of merchant ships being run down or damaged by ships of the Royal Navy; and that the surrender made by the Crown, at the beginning of every reign, of its hereditary revenues, in consideration of a parliamentary appropriation for the expenses of the civil list, without any provision being made for the satisfaction of claims of this description, had not only divested the Crown of any fund upon which a judgment in the nature of damages could be enforced, but was itself a strong circumstance to shew that the law recognised no such liability in the Crown as was sought to be enforced by this petition.


1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

On the other hand it was contended, that even supposing that the parties who did the injury were the servants of the Commissioners, yet, inasmuch as the service in which they were engaged at the time, was not within the sphere of the duties imposed upon the Commissioners by the act of parliament (b), but an extraordinary service in which the Commissioners were employed, as any other agents might have been, by the express order of the Sovereign, the Crown was liable as the ultimate principal; *Stone v. Cartwright* (c),
Bush

(a) 2 *Inst.* 186.

(c) 6 *T. R.* 411.

(b) 1 *W.* 4. c. 1.

1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

Bush v. Steinman.(a) With respect to the maxim the King could do no wrong, they contended that the construction put upon it by the other side, was incompatible alike with the dignity of the Crown, and with the rights and interests of the subject: that the true meaning of the maxim was, that the Crown had no right, by virtue of its prerogative, to do or authorise any act to be done, which, if done by a private individual, would be a wrong: *Sheppard's Abridgment* (b), and that no construction of the maxim, which should enable the King to do a wrong to the subject without being liable to make compensation for it, could be a right construction; for it was an established rule, that prerogatives must be for the advantage and good of the people, otherwise they ought not to be allowed by the law. 6 *Bac. Abr.* 386., 1 *Blackst. Com.* p. 230., *Rorke v. Dayrell.* (c) And that no argument in favour of the supposed exemption of the Crown could be legitimately founded upon the practice introduced in modern times, of surrendering the royal revenue to the service of the state, or upon the practical difficulty which that circumstance might create in the way of enforcing a judgment against the Crown; for, if the liability existed, it could not be doubted that the public, which was interested in maintaining the dignity of the Sovereign, would, through Parliament, provide the means of giving the party the fruits of his judgment, and would not allow an arrangement entered into solely with a view to the more convenient administration of the revenue, to stand in the way of the enforcement of a just and legal right.

3d. Whether a Petition of Right was a form of proceeding applicable to a claim for unliquidated damages.

On


(a) 1 *Bos. & Pul.* 404.

(c) 4 *T. R.* 402.; see p. 410.

(b) *Tit. Prerog.* p. 48. pl. 5.


On this point it was contended in support of the petition, that the petition of right would lie against the Crown, wherever an action would lie against a subject; the only reason why an action did not lie against the King, being the technical reason, that the King from whom all judicial process issued, could not issue process against himself (*Comyn. Dig. tit. Prerog. D. 78.*); and if the remedy by Petition of Right were not co-extensive with that by action, there would be cases in which a right would exist without a remedy. Even, therefore, if there was no precedent for a Petition of Right in a case of this kind, that would be no answer to the present petition; for if the right existed, there must necessarily be some mode of enforcing it, and it would not be pretended that there was any other form of proceeding for that purpose, but a Petition of Right; it was insisted, however, that the case of *Gervais de Clifton* (*a*) was, like this, a Petition of Right claiming compensation from the Crown for an alleged injury to the petitioner's land, and in which no objection appeared to have been taken to the form of the proceeding as being inapplicable to a claim of that nature. Another case was also cited from the *Year Book*, 17 *Ed. 3. f. 59. pl. 58.*, as an instance in which a Petition of Right had been brought upon an alleged *tort* on the part of the Crown.

On the other hand it was contended, that the remedy by Petition of Right was applicable only to cases where property of the subject was unjustly detained by the Crown, or where the subject claimed a debt due to him from the Crown by contract; *Staunford. (b)* That the proceedings in *Gervais de Clifton's Case* bore too little resemblance to those upon a Petition of Right, to be of

1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

(a) *Y. B. 22 Ed. 3. f. 5. pl. 12.*

(b) *Tit. Petition, ch. 22. Tit. Prerog. ch. 15. p. 42.*

1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

of any value as a precedent for such a petition in a case like the present, and it was further observed, that if any such precedent had existed, Lord *Somers* in his judgment in the *Banker's Case* (a), would not have failed to notice it, inasmuch as it was material to his argument to shew the utmost limits to which that remedy extended.


4th. Whether the reigning Sovereign was liable to make compensation for a wrong done by the servants, and during the reign, of his predecessor.

The objections taken to the Petition on this point were, first, that the Queen was not the personal representative of the late King; and secondly, that if she was, the case was within the rule *actio personalis moritur cum personæ*. In answer to which it was insisted, that as all acts done or orders given by the King in the exercise of his royal authority, were to be considered as the acts and orders not of the individual wearing the crown, but of the metaphysical abstraction called the King, and to which the Constitution assigned the attribute of perpetuity, so the liability for the consequences which might result from those acts and orders attached, not to the person of the sovereign, but to the kingly character, and consequently to the person who for the time being filled that character. That this peculiarity in the relation of successive Sovereigns made it impossible to apply to them the rules which regulated the succession to rights and liabilities in the case of private individuals: for instance, the right of presentation to vacant benefices, which in the case of private individuals passed to the personal representative, in the case of the Sovereign vested on his death in the successor to the throne; and if each Sovereign represented his predecessor for the purpose

(a) 14 *How. St. Tr.* 39. See p. 84.

purpose of succession to property, it would seem to follow that he should also represent him for the purpose of succession to liability.

The following cases were cited upon this branch of the argument. *Case of the Duchy of Lancaster* (a), *Soldiers' Case* (b), *Everle's Case* (c), *The Abbot and Convent of Warden's Case* (d), *Gervais de Clifton's Case* (e), and *Robert de Clifton's Case*. (g)

1842.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

The LORD CHANCELLOR.

1843.
 Feb. 11.

This was a demurrer by the Attorney-General to a petition of right.

The first question was, whether, as between one subject and another, an action can be maintained for damage through fire in a dwelling-house, occasioned by the negligence of the owner or his servants.

By the 6 *Ann. c. 31. s. 6.* it was enacted that no action should be maintained against any person in whose house or chamber any fire should accidentally begin. Sir *William Blackstone*, in his *Commentaries* (vol. i. p. 431.), observes, that by the common law, if a servant kept his master's fire negligently so that his neighbour's house was burnt down thereby, an action lay against the master. "But now," he says, "by statute 6 *Ann. c. 31.* the common law is altered, for that statute ordains that no action shall be maintained against any in whose house or chamber

(a) *Plowd.* 212.


(b) 6 *Co.* 27 a.

(c) *Ryley's Plac. Parl.* 251.r

(d) *Ryley's Plac. Parl.* 262.

(e) *Ubi supr.*

(g) 18 *Ed. 2.*, 1 *Rot. Parl.* 416.


1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

chamber any fire shall accidentally begin, for their own loss is sufficient punishment for their own or their servant's carelessness." He thus states it distinctly as his opinion that for a fire in a dwelling-house, originating in the negligence either of himself or his servant, the master is not responsible. No authority, indeed, or decision is referred to in support of this opinion, nor does the learned author explain how this construction of the act is to be reconciled with the words "shall accidentally begin." But although this work has gone through many editions and been subjected to much criticism, no observation that I can find has ever been made upon this passage, or any objection urged against it. I may further observe, that although cases of damage from the burning of houses occasioned by negligence have, doubtless, frequently occurred since the statute, I do not recollect, in the course of a pretty long professional life, any instance of an action having been brought to recover compensation for this species of injury, nor do I find in the books any trace of such a proceeding.

The learned counsel for the petitioner adverted to the previous state of the law, for the purpose of explaining what he supposed to be the object of the legislature in passing this statute. Every master of a house or chamber, he said, was bound so to keep his fire as to prevent it from occasioning injury to his neighbours and others. If a fire broke out in a house, and burnt the adjoining dwelling, or did other damage, the master of the house in which the fire began, was liable to make compensation for the injury: it was not necessary to prove negligence; the law presumed it, and it was stated in the declaration. The leading authority referred to was the *Year Book*, 2 H. 4. pl. 18., which, however, seems to have been differently interpreted by *Brooke*. (a) All the
 authorities

(a) *Br. Abr. Action on the Case*, pl. 50.

authorities on the subject are collected in the different abridgments, viz. in *Brooke*, in *Rolle*, in *Comyn's Digest*, in *Viner*, and other places. In *Rolle's Abridgment* (*Action on the Case* (B.), title *Fire*), they are thus stated:—"If my fire, by misfortune burns the goods of another man, he shall have his action on the case against me. 2 *H.* 4. 18. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbour's house, he shall have his action on the case against me. (42 *Ass.* 9.) So if the fire is caused by a servant, or a guest, or any person who enters the house with my consent. (*Ib.*) But otherwise, if it is caused by a stranger who enters the house against my will." (*Ib.*) This rule, it was said, was founded on the general custom of the realm; in other words, it was a peculiarity in the common law.

1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

It was further observed, that in the time of *Holt*, a doubt arose whether this custom extended to a fire lighted in the owner's close. The question, said the Chief Justice, is, whether a special negligence need be proved (thereby explaining the effect of the custom): and it was decided by three of the judges against one, that the action was well brought upon the custom. *Turbervill v. Stamp.* (a) But in that case it was said by *Holt*, that if the Defendant could show that the fire was occasioned by inevitable accident, by impetuous and sudden winds, and without negligence of himself or his servants, this would constitute a good defence.

The result as argued for the petitioner was this, that the master of a house was responsible for the safe keeping of his fire, and in the event of accident was only excused

(a) 1 *Comyn*, 32.. 1 *Salk.* 13.

1843.


 Viscount
 CANTERBURY


 v.
 The
 ATTORNEY-
 GENERAL.

excused by showing on his part that the calamity arose from some superior cause which he could not resist or control; and that the object of the statute of *Anne* was to correct this anomaly, and to put the law, in this respect, on the same footing as the general law of the country, namely, that the party should be responsible only upon proof that the fire was occasioned by actual negligence of himself or his servants. That the statute confined the indemnity to the person in whose house or chamber a fire should *accidentally* begin, and that it carefully guarded against extending it to cases of negligence.

It is remarkable that in *Bacon's Abridgment*, under the title *Action on the Case*, p. 104., he states that it was formerly held, that if a fire broke out accidentally in a man's house, and raged to that degree as to burn his neighbour's, that he in whose house the fire first happened was liable to an action on the general custom of the realm, *quod quilibet ignem suum salvo, &c.* "But now," he says, "by the stat. 6 *Ann. c. 31.* no action or suit shall be prosecuted against any person in whose house or chamber any fire shall accidentally begin." It seems, therefore, that the compiler of that work, the first edition of which was published not many years after the passing of the statute, considered that this was the true construction. The clause imposing a pecuniary penalty upon the servant, where the fire is occasioned by his negligence or carelessness, and subjecting him, if it be not paid, to imprisonment and hard labour, does not affect the question.

It is deserving of notice that the statute of *Anne* is confined to houses; but in the case of *Turbervill v. Stamp* the custom was held to apply to a case where the
 fire


fire was kindled in the defendant's close. If the act, therefore, was intended to put an end to this peculiarity in the common law, it was obviously defective. But this defect seems, either intentionally or otherwise, afterwards to have been remedied by the subsequent statute 14 G. 3. c. 78., which enacts that no action shall be brought against any person in whose house, chamber, or other building, *or on whose estate*, any fire shall accidentally begin, any law, usage, or custom to the contrary notwithstanding—thereby extending the provision to the case of a fire lighted in a close or field, apparently, as it was said at the bar, with the view of meeting the decision in the case of *Turbervill v. Stamp*.

1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

Some decisions were cited in support of the construction contended for by the petitioner. An action was tried before Mr. Baron *Alderson*, at the assizes for *Berkshire* a few years since, for negligence by the defendant in burning weeds in his field, whereby an adjoining plantation was destroyed. The jury, under the direction of the learned Judge, found a verdict for the plaintiff. The foundation of this action was negligence; and if the statute of *Anne*, and consequently the 14 G. 3. c. 78. would have exempted the owner of a house from the consequences of his negligence, the latter statute would equally have protected the defendant in this instance. This, therefore, it was said was a direct authority against the construction put upon the statute of *Anne* by Sir *William Blackstone*. It is true that this was a *Nisi Prius* decision; but the case was afterwards cited in the Common Pleas in *Vaughan v. Menlove (a)*, and appeared to have the sanction of the Judges of that Court. But the case of *Vaughan v. Menlove* was also an authority to the same effect. The defendant had negligently managed
 a stack

(a) 4 *Scott*, 244.

1843.


 Viscount
 CANTERBURY


 v.
 The
 ATTORNEY-
 GENERAL.

a stack of hay on his premises, in consequence of which it took fire, and the plaintiff's property was thereby destroyed. By the statute, a party on whose estate a fire shall accidentally begin shall not be liable to an action for any damage which may be thereby occasioned. Sir *William Blackstone's* construction is, that although the fire be occasioned by the negligence of the party, he shall not be liable. In this case, however, the Court of Common Pleas decided otherwise, and judgment was given for the plaintiff. One of the Judges (Mr. J. *Bosanquet*) stated that the course which a reasonably prudent and careful man would adopt is the criterion in the case of a fire kept in the *house*. The same principle, he observed, must govern the case then before the Court. It seems, therefore, to have been the opinion of that learned Judge that the master of a house would be responsible where the fire was occasioned by his negligence. And it appears by a recent case in the Common Pleas, that such is the law of *Scotland*. Upon neither of the above occasions, however, was any reference made to the statute, or the attention of the Court in any way called to it.

Such was the general scope of the reasoning of the learned counsel upon this part of the case. It was argued at great length and with much ability and learning, and these observations will well deserve attention when a case shall occur requiring a decision of the question. It does not appear to me, however, that such necessity exists in the present instance; for even if I should be of opinion, in this conflict of authority, that the construction for which the petitioner contends is the true construction of the statute, I feel that I must still come to the conclusion that the petition cannot be maintained, and that the demurrer of the Attorney-General must be allowed.

There

There is in the way of the petitioner a difficulty which struck me at the very commencement of the argument, and to which I have not had a sufficient answer. It is admitted that, for the personal negligence of the Sovereign, neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that *qui facit per alium, facit per se*, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the sovereign to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy.

1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

Cases have arisen of damages done by the negligent management of ships of war. It has been held that where the act is done by one of the crew without the participation of the commander, the latter is not responsible. (a) But if the principle now contended for be correct, the negligence of the seamen in the service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by a Petition of Right. Though several cases of this nature have happened at different periods, it seems never to have occurred to the parties injured or to their advisers, that redress could be obtained by means of a Petition of Right. It would require, I think, some very precise and distinct authority to establish such a liability, and in the absence of any such authority, I cannot venture, for the first

(a) See *Nicholson v. Mounsey*, 15 East, 384.

1843.


Viscount
CANTERBURY
v.
The
ATTORNEY-
GENERAL.

first time, to lay down a rule which it is obvious would lead to such extensive consequences. I have not lost sight of the case of *Gervais de Clifton*, which was referred to as establishing this position, but I pass it by for the present, as I shall hereafter have occasion to advert to it.

Another objection has been urged against the claim of the petitioner. If the case were between subject and subject, this objection would be fatal ; and it is admitted, on the part of the petitioner, that he can only expect to succeed if he would have had a right to redress in an action against a private individual. Now, the cause of action arose in the time of the late King, and it is clear that had this been a case between subject and subject, an action could not have been supported, upon the principle that *actio personalis moritur cum personâ*. It is contended that a different rule prevails where the Sovereign is a party ; but some authority should be adduced for such a distinction. It is true, indeed, that the King never dies ; the demise is immediately followed by the succession ; there is no interval. The Sovereign always exists ; the person only is changed. But if there be a change of person, why is the personal responsibility arising from the negligence of servants (if indeed such responsibility exists) to be charged upon the successor, ceasing as it does altogether in the case of a private individual ? In the case of a subject, the liability does not continue in respect of the estate ; it devolves neither upon the heir nor the personal representative ; it is extinct. I should find it difficult, therefore, in the case of the Crown, to say with any confidence that the liability continued and was transferred to the successor unless some distinct authority were shewn in support of such a doctrine. Several cases were referred to for this purpose in the argument at the bar ; but the

we —


were cases of grant, covenant, debt, or relating to the right of property, in which, from analogy to the case of a subject, the Crown might be liable in respect of the succession, and do not, I think, sufficiently establish the principle for which they were cited. The case of *Robert de Clifton*, to which I shall hereafter refer in connection with that of *Gervais de Clifton*, fails in respect of the fact, and does not support the position.

1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

Another objection arises out of the establishment of the Commissioners of Woods and Forests. Her Majesty, in imitation of the course pursued by her predecessors, has given up her territorial possessions to the public during her life; and parliament has in exchange made a provision for the civil list and the personal expenses of the Sovereign out of the consolidated fund. For the purpose of managing these territorial possessions, and of executing such works as the civil service requires, parliament has created certain public officers, viz. the Commissioners of Woods and Forests.

The salaries of these commissioners and the expenses of the establishment, and of managing the business of this department, which is placed under the control of the Treasury, are defrayed out of the revenues arising from the property so surrendered, and are consequently paid by the public. These officers are appointed by the Crown, and are removable at pleasure. The subordinate agents are appointed by the Commissioners, and removable by them. The Crown has nothing to do with their appointment, or removal. It is by these agents that, according to the statement in the petition, the fire was occasioned.

Now, assuming that the fire had been caused by the personal negligence of the Commissioners, would the
 Crown,

1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.


Crown, in such case, have been liable to make good the loss? They are, indeed, styled servants of the Crown; but they are, in truth, public officers appointed to perform certain duties assigned to them by the legislature, and for any negligence in the discharge of such duty, and any injury that may be thereby sustained, they alone are, I conceive, liable. Is it supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? At least some authority should be cited in support of such a doctrine. But then it is said, these officers are appointed by the Crown, and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the state have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern.


The remaining question is as to the remedy by Petition of Right. Does it apply in such a case as the present? *Staunford* says,—“Petition is all the remedy the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his laws to do so, in which case the subject, for his remedy, is driven to sue unto his Sovereign Lord
 by

by way of petition only, for other remedy hath he not." He speaks of this proceeding as applicable to the illegal seizure by the King of the *lands* or *goods* of a subject: and although this is not conclusive against its application to other cases, yet no instance has been cited, with the exception of that of *Gervais de Clifton*, to which I shall presently refer, in which the remedy by Petition of Right has been attempted to be applied, to recover, not any property, but damages simply for a wrongful act alleged to have been committed by the Crown or its servants. It seems, indeed, to have been doubted whether a Petition of Right could even be maintained for a chattel or for any thing short of a freehold interest (1 *H.* 7., 3 *Bro. Pet.* 19.); and although this opinion does not appear to be well founded (*a*), yet, coupled with the absence of any decision or *dictum* in favour of this attempt, it affords an argument against the application of this remedy to a case like the present. No industry has been wanting on the part of the petitioner. The *Year Books*, with the abridgments of *Fitzherbert* and *Brooke*, and other authorities, have been carefully searched, and no case has been found to warrant this proceeding. The decisions go back several hundred years, and in the absence of all precedent during so long a period, I think I should not be justified in deciding, for the first time, that such a proceeding can be maintained. Indeed, if the Crown cannot be guilty of negligence or personal misconduct, and is not responsible for the negligence or personal misconduct of its servants, it follows, of course, that in those cases there can be no such remedy; and, on the other hand, the absence of all trace of the remedy would itself afford a strong argument against the liability.

But

(*a*) *Br. Abr. Pet.* pl. 3., 34 *H.* 6. 51., 7 *H.* 7. 11., and the above passage in *Staunford*.


1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

But the case of *Gervais de Clifton* is relied upon as a precedent in favour of the claim. That case, which stands by itself, occurred in the reign of *Edward III.* It went off at almost the earliest stage upon a point of form, viz. that the Chancellor had sent the tenor of the verdict, instead of the verdict itself, into the Court of King's Bench. It led to no argument, to no discussion, and to no judgment. It is obvious that the defect in form might have been soon and easily removed; but no steps for this purpose appear to have been taken, and there is no trace of the claim having been afterwards prosecuted. No reliance can therefore be properly placed upon this proceeding.

But a similar complaint appears to have been made upwards of twenty years before, viz. in the 18th of *Edward II.* by *Robert de Clifton*, at that time the owner of the property, and the nature of the complaint throws, I think, some light upon the other proceeding. The petitioner states, among other things, that trenches were dug and certain works erected by the wardens of *Nottingham Castle*, on the land of the petitioner, by which the waters of the *Trent* were diverted from their accustomed channel and made to flow over the petitioner's property, and that turves were taken from the petitioner's land to repair these works, and that his estate was, by these means, much injured, while the King's mills were greatly benefited. It appears, therefore, from this statement, that some of the works complained of were formed on the petitioner's land, and were kept up and repaired by the wardens of *Nottingham Castle*, who continually exercised acts of ownership for this purpose over the property, and that the works were necessary for the King's mills, four of which must, as it was stated, have been otherwise discontinued. There was, therefore, some colour

colour in this case for a Petition of Right; for the wardens had formed these works on the petitioner's land, and held and maintained them on account and for the benefit of the King. But still this does not appear to have been a Petition of Right. It is a petition presented in parliament, and it recites a commission and inquisition, whereas, in a Petition of Right, the commission and inquisition are subsequent to, and consequent on, the petition: and the prayer is for a matter of pure grace and favour, viz. that the King would, as a compensation for the injury the petitioner had sustained, appoint him to the stewardship of the Honour of *Peveril*, paying a small annual rent, as usual, into the Exchequer. The King directed, in answer, that the matter should be referred for inquiry to certain members of the Council.

1843.

 Viscount
 CANTERBURY
 v.
 The
 ATTORNEY-
 GENERAL.

But this case was cited for another purpose, viz. to shew that a mere wrong committed in the time of one monarch, might be made the subject of a petition of right to his successor. It does not, however, answer this purpose; for, even assuming the alleged injury to have been the same as in the subsequent case of *Gervais de Clifton*, it was a continuing injury, and the inference therefore altogether fails. It may further be observed, in reference to the case of *Gervais de Clifton*, that if the wardens held and maintained on account of the Crown, and under a claim of right, the works formed and erected in the time of *Robert*, which is not improbable, this might have afforded some ground for the Petition of Right presented by *Gervais*.

I am compelled to come to the conclusion that this proceeding cannot be maintained, and that the demurrer of the Attorney-General must be allowed. It is a great satisfaction to me to know that in this singular and novel case, involving much that is obscure and almost obsolete,

1843.

Viscount
CANTERBURY
v.
The
ATTORNEY-
GENERAL.

solete, if I am wrong in the opinion I have given (and I have formed it not without care and much anxious consideration), it is open to review by writ of error, should the petitioner be advised that there are sufficient grounds to question its correctness.

April 9.
May 6.
Nov. 25.

DAVIES v. LOWNDES.

Semble. The stat. 3 & 4 W. 4. c. 27. s. 36., has abolished the doctrine of journey's accounts, as applied to Writs of Right sued after the 31st of Dec. 1834.

Semble. An action cannot be continued by journey's accounts where it has abated by the death of a sole Defendant, any more than where it has abated by the death of a sole Plaintiff.

Where the objection to the legality of a writ is one which may be taken upon the record, and so be made the sub-

IN the month of *December* 1832, *Thomas Davies* and *Elizabeth*, his wife, brought a Writ of Right against *William Selby Lowndes* for certain manors and lands, of which an ancestor of the said *Elizabeth* had died seised on the 7th of *December* 1772. That action was twice tried, and on both occasions there was a verdict and judgment for the tenant. On the 24th of *January* 1843, the second verdict and judgment were reversed, as the first had been, in the Exchequer Chamber, and a *venire de novo* was awarded: but between the date of the judgment and the reversal of it, *W. S. Lowndes*, the father, died, whereupon *Elizabeth Davies* (her husband being dead) sued out a fresh Writ of Right against *William Selby Lowndes*, his son.

A motion was now made on behalf of *W. S. Lowndes*, the son, that that writ might be quashed, set aside, or superseded, or that all further proceedings under it might be stayed.

Sir *T. Wilde*, Mr. *Bayley*, and Mr. *Gray*, in support of the motion.

This

subject of an appeal, the Court will not quash the writ upon motion, unless it is satisfied, beyond all doubt, of the validity of the objection.

1843.

DAVIES
v.
LOWNDES.

This writ has been issued contrary to the provisions of the 3 & 4 W. 4. c. 27. s. 36., and ought therefore to be quashed; *Foot v. Collins.* (a) The argument, however, will be that it has been purchased by journey's accounts, and that a writ so purchased is not within the meaning of that section. But the answer to that is two-fold; first, that this is not a case in which, even independently of the statute, a writ would lie by journey's accounts; and, secondly, that if it would, that section of the statute has abolished such writs in all cases, except those which are expressly provided for by the two following sections, and it will not be pretended that the present case comes within any of the exceptions.

With respect to the first point, it is laid down in *Spencer's Case*, that a writ by journey's accounts does not lie, but between those who were parties to the first writ, as where one of the Plaintiffs dies, or one of the Defendants: from which it follows, that it will not lie where the first writ abates by the death either of a sole Plaintiff or a sole Defendant. In *Brooke's Reading* (b), it is said expressly that such a writ "does not lie against him which was not a party to the first writ." And in *Brooke's Abridgement* (c), it is said by *Newton J.*, none shall have action by journey's accounts but one who was party to the first writ, and against one who was party to the first writ. In *Heyward v. Kinsey* (d), where a husband having brought an action of assumpsit within six years, died after that period had expired, and his wife, as his administratrix, brought a new action by journey's accounts against the same party; the proposition cited from *Spencer's Case* was strenuously controverted by the

(a) 1 M. & Cr. 250.

(b) P. 155.

(c) Tit. *Journey's Accounts*,
pl. 12.

(d) 12 Mod. 568.

1843.

 DAVIES
 v.
 LOWNDES.

the counsel for the Plaintiff, who contended that the new action was well brought, and that the authorities cited by Lord Coke in support of his proposition did not warrant it: but Holt C. J. said, "It is plain, journey's accounts will not lie in this case, for the rule is, that it must be between those who were parties to the first writ." And in the same case as reported by *Lutwyche* (a), it is said to have been admitted as good law, that such a writ lies in no case where there is but one Plaintiff and one Defendant, and one or the other dies. And Treby C. J., in delivering judgment on the same case in the Court below (b), said, that his own decision in the previous case of *Elstobb v. Thoroughgood* (c), in which it had been held that a general executor might have a writ by journey's accounts, upon a writ brought by an executor *durante minoritate*, could not be supported on the principle of journey's accounts, though the case was rightly decided on other grounds. Besides these direct authorities upon the point, there are several cases in which the doctrine of journey's accounts is incidentally referred to, and it is remarkable that in all of them the abatement is assumed to have been occasioned by the death of one of several, either Plaintiffs or Defendants. (d)

It is true, that in *Comyn's Digest* (e), it is said, that if a writ abate by the death of the tenant or defendant, where there is only one defendant, the demandant or plaintiff may have a new writ by journey's accounts: but none of the authorities which he cites bear him out, except *Denis de la Rivers' Case* (g), and a passage from *Fitzherbert*;

(a) 1 *Lutw.* 260.

H. 4. f. 22., 14 *H.* 6. f. 4., 14

(b) 1 *Ld. Raym.* 432.

H. 6. f. 7.

(c) 1 *Ld. Raym.* 283., 1 *Salk.*

(e) *Tit. Abatement*, p. 179.

395.

(g) 10 *Ed.* 3. 16.

(d) *Y. B.* 43 *Ed.* 3. f. 16., 14

Fitzherbert (a); while the dictum above mentioned from *Lutwyche*, which he also refers to, is opposed to him.

1843.

DAVIES

v.

LOWNDES.

Denis de la Rivers' Case was an action of *quare impedit* against the prior of the hospital of *St. John of Jerusalem*, who pleaded "plenarty at and for seven months before the writ was purchased on the presentation of his predecessor; and that the prebend in question is now full of the presentation of the Defendant," to which the Plaintiff replied, "that within six months after the avoidance by the death of *Henry de Clifford*, the presentee of her ancestor, she brought *quare impedit* against the defendant's predecessor; and that her writ abated by his death, and that she freshly purchased this writ against the defendant." Now it certainly does appear to have been ultimately decided that the writ could be maintained: but the decision is of little value as an authority, inasmuch as it must have assumed, that an action would lie against a successor for a disturbance by his predecessor, the contrary of which was adjudged in the *Prior of Calewell's Case*. (b)

In the passage from *Fitzherbert* it is said, that "if a disturber present to an advowson, and the patron bring an assize of darrein presentment, and pending the writ the incumbent dies, if the disturber presents another incumbent and dies, yet the patron shall have an assize of darrein presentment upon the first disturbance against the heir of the disturber, per journey's accounts." But no authority is cited for the proposition, and it is probable that the learned author was thinking of *Denis de la Rivers' Case*.

In

(a) *Nat. Brev.* 32.

(b) 9 *H.* 6. 30.

VOL. I.

Z

1843.

DAVIRS

v.

LOWNDES.

In the case cited by *Comyn* from *Leonard* (a), there does not appear to have been any question about journey's accounts, nor is it easy to conceive how there could have been, for it was the case of a writ of error in the reign of *Queen Elizabeth*, when there was no limitation to the time for bringing such writs, the first limitation applicable to them being introduced by the stat. 10 *W. 3. c. 14.* The case from *Year Book*, 8 *H. 5. 6. a.*, which is the only other authority cited by *Comyn* in support of the proposition in the text, seems to be equally inconclusive: for the observation of *Babington C. J.*, for which the case appears to be cited, is pointed not to the question now under discussion, but to the distinction between abatements by the default of the Plaintiff, and abatements from any other cause.


But, secondly, the doctrine of journey's accounts has ceased to be applicable to writs which are abolished by the 3 & 4 *W. 4.*, for the enacting clause is peremptory that no such writs shall be brought after the 31st of *December 1834*, and the decisions in the corresponding section of the 32 *Hen. 8. c. 2.* shew that the exemptions contained in the two following clauses are to be construed strictly, and are not to be extended to any case but those which are expressly provided for. (b)

The present case, however, will perhaps be compared to those which have arisen on the Uniformity of Process Act (c), and in which, although the act had declared that all personal actions should thenceforth be commenced by writ of summons, it was held, that where
actions

(a) 1 *Leon. 22.*(c) 2 *W. 4. c. 59.*

(b) The details of the argument on this point will be found in the judgment, pp. 338, 339.

actions had been commenced by bill of *Middlesex* before the act came into operation, the process might be continued after that period by *alias* and *pluries* bills of *Middlesex*. *Storr v. Bowles* (a), and *Finnie v. Montague*. (b) But the present case is distinguishable from those for two reasons: first, because that statute contains no negative words, as this does; and, secondly, because a writ purchased by journey's accounts is not a continuance of the former suit, but the commencement of a new one. It is true, that passages may be found in the books in which a writ purchased by journey's accounts, is said to be "*quodammodo* a continuance of the former writ;" but it is not really a continuance. All that is meant, and all that the cases decide, is that the new writ is allowed to have that effect, so far as to prevent the Defendant from availing himself of any defence arising subsequently to the date of the first writ. In all other respects, the new writ is the commencement of a new suit: it requires a new appearance: the pleadings are to be commenced *de novo*: the Defendant may even set up a defence inconsistent with his defence to the first writ. And it appears from *Spencer's Case* (c), that questions have arisen as to whether the new action might be brought in a different court from the old one, or whether it must be brought in the same Court; which questions could never have arisen if the second action had been merely a continuation of the first.

1843.

 DAVIES
 v.
 LOWNDES.

The Solicitor-General, Mr. Williams, and Mr. Willis, contra.

This writ has been properly issued by journey's accounts, notwithstanding, the stat. 3 & 4 *W. 4. c. 27*. The proposition contended for on the other side, that
 a writ

(a) 4 *B. & Ad.* 112.

(c) 6 *Co.* 10.

(b) 5 *B. & Ad.* 677.

1843.


DAVIES

v.

LOWNDES.

a writ by journey's accounts does not lie either upon the death of a sole Plaintiff or of a sole Defendant is too large; for though there are certainly authorities for the first part of it, but there are none for the second; on the contrary, there are several authorities of great weight against it. In *Kinsey v. Hayward*, the abatement was occasioned by the death of a sole Plaintiff, and there is nothing in the judgment either of *Treby* C. J. in the court below, or in that of Lord *Holt* in error, to shew that the decision would have been the same if the abatement had been caused by the death of a sole Defendant. On the contrary, Lord *Holt* states a reason for the rule in the former case, which does not apply to the latter; viz. that the new writ is to be the same as the former, and the writ that lies for the ancestor or for the testator, is not the same that lies for the heir or the executor, but one of another nature. As to the dictum contained in the report of the same case in *Lutwyche*, even supposing the report to be accurate, it is too loose to be relied on; for the observation of counsel, which the Court is represented to have recognised as good law, embraced several points, and it cannot be safely assumed that the Court meant to assent to every one of them. Besides, the book, as is well known, is not a collection of reports, but merely of loose notes or entries, which, when compared with contemporary reports, are often found to be inaccurate; and, in this instance, we have Lord *Raymond's* own report to compare it with, in which there is no trace of any such dictum. It is not immaterial, too, to observe that in *Spencer's Case*, though it is expressly laid down that the writ by journey's accounts, will not lie on the death of a sole Plaintiff, Lord *Coke* does not say the same thing with respect to a sole Defendant. And the distinction between the two cases seems to be recognised in a recent case in the Queen's Bench: *Adams v. The*

v. *The Inhabitants of Bristol* (a), where Lord Denman, in delivering the judgment of the Court, says, that the old doctrine of journey's accounts is not applicable where the *Plaintiff* in an action dies, the word *Plaintiff* being printed in Italics.

1843.

 DAVIES
 v.
 LOWNDES.

So much for the authorities relied upon by the other side in support of the second branch of their proposition. On the other hand, there is *Denis de la Rivers' Case*, which is admitted to be an express decision to the contrary: and the authority of Chief Baron Comyn, who, in his *Digest*, adds the weight of his own opinion to that of the authorities which he cites, for the proposition that the writ by journey's accounts will lie on the death of a sole Defendant, though not on that of a sole Plaintiff.

Assuming then that such was the state of the law when the stat. 3 & 4 W. 4. c. 27. passed, has that statute altered it? We submit that it has not; inasmuch as the object of the legislature in the 36th section of that act was, not to interfere with suits which were then pending, but merely to prevent any new actions of certain kinds from being brought for the future. Unless, therefore, the writ by journey's accounts can be treated as the commencement of a new action, it is not within the operation of that section. Now there are several incidents of a writ so purchased which shew that it cannot be considered in that light, but that it is in reality a continuation of the former action. For first, the proceedings upon the new writ are entered upon the old roll. *Rastell's Entries*. (b) Secondly, where an action against an executor abates, and a new writ

(a) 2 Ad. & Ell. 404.

(b) P. 417.

1843.

DAVIES

v.

LOWNDES.

writ is brought, by journey's accounts, against his executor, the new defendant, if he pleads *plene administravit*, must plead it as at the date of the first writ. *Spencer's Case*. (a) Thirdly, the plaintiff or demandant, if he succeeds, is entitled to the costs of the first writ. (b) Fourthly, the defences under the various statutes of limitation are regulated by reference to the date of the first and not of the second writ. *Year Book*, 7 H. 6. s. 16. (where the question arose upon the statute 1 R. 2. c. 9.); *Dallison* 3. (where it arose upon the stat. 32 H. 8. c. 2.); *Br. Abr.* tit. *Journeys' Accounts*; *Wilcocks v. Huggins* (c), *Elstobb v. Thoroughgood*. (d)

But lastly, even supposing that the objections to the writ have any validity, this is not the form in which they ought to be taken. The case of *Foot v. Collins* has no application: for there, the irregularity complained of was in the nature of a fraud upon the Court, and if the objection had not been taken to the writ itself, it could not afterwards have been taken in the pleadings. But in this case the objection may be, and in practice always has been, taken by the plea of *non tenure*, in which form, being on the record, it may be made the subject of a writ of error, which it cannot be if allowed in the present stage of the proceedings.

The LORD CHANCELLOR.


The principle on which I should proceed in a case of this kind would be, that unless it was perfectly clear that the objection was valid, I should not interfere to quash the writ, because the party would then have no appeal. If I were satisfied beyond all doubt that the writ had
been

(a) 6 Co. 10 b.

(b) *Ibid.*(c) *Fitzgibbon*, 289.(d) *Ubi supra*.

been improperly issued, I might feel myself justified in interfering in this summary way, but not otherwise.

Sir *T. Wilde*, in reply.

1843.

 DAVIES
 v.
 LOWNDES.

The LORD CHANCELLOR.

Nov. 25.

This was a motion to supersede a writ of right, on the ground of its having issued after the 31st of *December* 1834, the time limited by the 3. & 4 *W. 4. c. 27. s. 36.* By which statute it is enacted, that no writ of right and no other action, real or mixed, (except a writ of right of dower &c.) shall be brought after the 31st of *December* 1834.

In opposition to this motion it was contended, that the first writ having abated by the death of the tenant, and this writ being sued by journey's accounts against the heir, it was a continuance of the former writ, and did not come within the prohibition of the statute.

Where a writ is sued by journey's accounts, it has the effect, at Common Law, of giving the Plaintiff, in many cases, the benefit of the former suit; as where one of two joint tenants dies, by which the writ abates, the Plaintiff is allowed within a reasonable time to sue out a new writ, and "the Defendant will not be allowed to take any advantage, but such as he had at the time of the first writ;" *Walthall v. Aldrick.* (a) It is sometimes called a continuance, as by *Treby C. J.* in *Kinsey v. Hayward*, by Chief Baron *Comyn* in his *Digest*, and by other authorities. But it is not I think strictly a continuance, for it issues where the former
 suit

(a) *Cro. Jac.* 588., see p. 590.

1843.

DAVIES

v.

LOWNDES.

suit has abated. Lord *Coke* appears to have been of this opinion, for in speaking of it in *Spencer's Case*, he calls it *quodammodo* a continuance. It is in truth an indulgence allowed by the Common Law in certain cases, and the time within which it is to be brought is regulated by the discretion of the judges. It is a new suit, to which, in certain cases and for certain purposes, the benefit of the abated suit is given, and, in some instances, even the costs of the abated suit. The proceedings in the former suit are entered upon the roll, and these are followed by the proceedings upon the second writ.

The Common Law, as I have observed, gives this indulgence in certain cases of abatement; but the question is, whether this indulgence can be allowed where the legislature has said that no writ of right (the writ in this case) shall be sued out after a specified day. The words of the act are express and peremptory, "no writ of right patent &c. shall be brought after the 31st of *December* 1834." This enactment extends to every writ of right, with the exceptions mentioned in the statutes, and would, in its terms, comprehend writs sued as well by journey's accounts as otherwise. If we refer to the construction put on former statutes of limitation, it will be found not only to afford no ground for the exception contended for in this case, but to lead to an opposite conclusion.

First then as to the act 32 *H. 8. c. 2*. It enacts, that "no person shall sue or maintain any writ of right of any manors, lands, &c. of the possession of his ancestors, and allege any further seizin of his ancestors, but only of the seizin within sixty years next before the teste of the writ" &c. This is followed by a clause in which it is provided that "every person, who, at the time of passing
of

1843.

DAVIES
v.
LOWNDES.

of the act, had any of the said writs depending, or should thereafter bring any of the said actions at any time before the feast of the Ascension, in the year 1546, should allege the seizin &c. as he might have done before the making of that statute." There is a further proviso, that "if any person before the feast of the Ascension in the year 1546, shall sue any of the said writs &c., and the same shall become abated by the death of any of the said parties, then the same person being then alive, and if not, then the next heir of such person may pursue his action' upon the same matter, within one year next after such action or suit abated, and shall enjoy all such advantage as he might have had in the former action or suit." The act provides only for the case of abatement by death, and it has been considered under this statute, that where the suit became abated for any other cause, the Plaintiff or demandant was not entitled, after the expiration of the time limited, to have a new writ by journey's accounts; *Brooke's Reading on the Statute of Limitations*, pp. 154, 155. He mentions, as an instance, a *præcipe* brought upon the ancient limitation before the Ascension 1546. "The tenant tendered his law of *non summons*, and performed that after the Ascension, and by which the writ abated; and the Plaintiff brought a new writ within the year by journey's accounts &c.; he shall not have advantage to declare upon the ancient limitation, because that is expired, and the statute doth not warrant any abatement but by death." Again, "A man brought a *præcipe* upon the ancient limitation before the Ascension, the writ is abated by false Latin after Ascension, and the demandant prayeth to have another writ, and taketh it freshly by journey's accounts, within the year &c.; the tenant pleads *non tenure*; the demandant shall not have advantage to aver him tenant the day of the first writ, by journey's accounts, because the first writ did not abate by

1843.

DAVIES

v.

LOWNDES.

by death, and the averment proves, that he took the writ upon the ancient title, where the ancient limitation is determined; and, therefore, without the case of the statute." If the writ by journey's accounts were merely a continuance of the old writ, and had the effect contended for, the Plaintiff would in these cases have been protected from the general enactment of the statute. The interpretation put upon this act applies directly to the case now before the Court.

In the more modern statute of limitations, 21 *Ja.* 1. c. 16. s. 3., it is provided that where the judgment for a Plaintiff is reversed by writ of error, and in certain other cases, the plaintiff may bring a new action within a year after the reversal. It has been determined under this statute that if a Plaintiff having commenced an action within the time limited for that purpose, shall die before judgment, his executor may bring a fresh action within a year from the death of the testator. The case of death is not provided for by the act, which is confined to error, arrest of judgment, and outlawry; but this has been decided upon what is called the equity of the statute, from analogy to the cases that are expressly provided for, and as falling within the same principle. This is not a case of journey's accounts (*a*), for a writ by journey's accounts cannot be sued out on the death of a sole Plaintiff, and the doctrine of equitable extension cannot be applied to the present act, for there is nothing on which to found it.

Another objection was made to the writ, viz., that it could not be brought upon the death of a sole defendant. There is some conflict between the authorities upon this point. It is said in *Spencer's Case*, that "it
lies

(*a*) *Lutw.* 260.

1843.

DAVIES

v.

LOWNDES.

lies not but between those that were parties to the first writ, as where one of the Plaintiffs or one of the Defendants dies," and as it clearly will not lie upon the death of a sole Plaintiff, it is not very easy to understand why a different rule should be applied to the death of a sole Defendant. In the case of *Dower* (a) it was held that upon the death of the tenant, the Plaintiff should not have the benefit of a writ of journey's accounts; and in *Lutw.* 260., in the case of *Kinsey v. Hayward*, it was stated by *Girdler*, the counsel for the Defendant, that "the writ brought by journey's accounts lies only between the parties to the first writ, or some of them, as if one of the Plaintiffs or one of the Defendants dies, but in no case where there is only one Plaintiff or one Defendant, and one or the other dies;" and this appears to have been admitted by the Court. Chief Baron *Comyn*, however, seems to be of opinion that the writ will lie in such case, and after referring to the passage in *Lutwyche*, he cites, among other authorities, a case in *Leonard* (b), in which it was brought, apparently without objection, against the heir of the original Defendant. I should not, therefore, feel myself justified in ordering the writ to be superseded on this ground, and thereby putting an end to the suit by so summary a mode of proceeding.

With respect to the other and principal objection, I strongly incline to think the writ cannot be sustained; and if it were necessary to decide the question on this motion, I should so determine. But as the Plaintiff would, in that case, be without remedy, and could not bring the subject under the review of any other tribunal, I think I ought not, having regard to the nature of the question,

(a) *Brooke's Abr.* tit. *Journey's Accounts*, pl. 13.

(b) 1 *Leon.* 22.

1843.

DAVIES
v.
LOWNDES.

question, to interfere in this stage of the proceedings, but leave the Defendant to raise the objection upon the record, in the Court in which the suit is now depending.
Motion refused.

Feb. 15. 25,
24.
Dec. 6.

MEEK v. KETTLEWELL.

A testator bequeathed a sum of money to trustees in trust for his daughter for life, and in case she died without leaving issue, for her next of kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next of kin, by a voluntary deed assigned her expectant interest in reversion to the husband. Held on the death of the daughter, without leaving issue, that the assignment operated only as an agreement to assign; and, consequently, that being voluntary, a Court of Equity would not enforce it

THIS was an appeal, by the Plaintiff, from a decree of Vice-Chancellor *Wigram*, dismissing the bill without costs. The facts of the case, which are briefly stated at the commencement of the Lord Chancellor's judgment, will be found more fully detailed in the report of the case upon the hearing in the Court below. (a)

The appeal now coming on to be heard,

The Solicitor-General and *Mr. Hetherington*, for the Appellant, contended that the present case was distinguishable from those of *Colman v. Sarcl* (b), *Antrobus v. Smith* (c), and *Edwards v. Jones* (d), on which the Vice-Chancellor had rested his decision; for in all those cases the subject-matter of the assignment was a legal chose in action which could be reduced into possession only by an action at law, and consequently the very act of resorting for relief to a Court of Equity implied an admission that the assignment, as it stood, was incomplete. In the present case, on the contrary, the subject-matter of the assignment — a contingent reversionary interest in a sum of money vested

(a) 1 *Hare*, 464.(b) 1 *Ves.* jun. 50.(c) 12 *Ves.* 39.(d) 1 *Myl. & Cr.* 226.

vested in trustees — was purely equitable in its nature; the right to which, whether in the hands of the assignor or the assignee, was a right which could only be enforced in a Court of Equity: that right was what the deed of the 10th of *September* 1839 purported to assign, and the bill proceeded upon the assumption that the assignment was complete by virtue of the deed alone, for it prayed no direct relief against the Defendant *Mary Kettlewell*, the assignor, but merely asked that the trustees might be decreed to pay the money to the Plaintiff, the assignee, in pursuance of the deed. The Vice-Chancellor, indeed, although he rested his decision upon the contingent nature of the interest in question, seemed to think that the assignment, being voluntary, would have been ineffectual without some further act, whatever might have been the nature of the interest; for he laid it down as what he conceived to be the established doctrine of the Court, “that a voluntary assignment, though in a legal form, if unaccompanied by any other act, was not to be regarded as effectual to pass an equitable interest,” at the same time intimating that notice to the party, in whose hands the legal title was vested, was necessary to make the assignment complete; but the case of *Holloway v. Hcadington* (a), to which he referred in connection with that proposition, was, in fact, no authority for it; and, on the other hand, *Sloane v. Cadogan* (b) was an instance in which the Court gave effect to such an assignment, and no mention was there made of notice. The only cases, indeed, in which notice was material in reference to transfers of purely equitable interests were those in which there was a contest for priority between two different assignees of the same fund, as in *Dearle v. Hall* (c): as between the assignor and the assignee, the assignment itself was binding and conclusive,

1843.

 MEEK
 v.
 KETTLEWELL.

(a) 8 *Sim.* 324.

(c) 5 *Russ.* 1.

(b) *Sug. V. & P.* app. xxvii.

1843.

 MEEK
 v.
 KETTLEWELL.

conclusive, and no notice to the trustee was necessary to perfect it.

With respect to the peculiar nature of the interest which was the subject of this assignment, they submitted that there was a fallacy in comparing it, as the Vice-Chancellor had done, to the expectancy of an heir in the lifetime of his ancestor; that being a mere possibility of legal succession, whereas this was a contingent interest under a limitation in a will, and the same thing as if the limitation had been, to the Defendant *Mary Kettlewell*, by name, in case her daughter died in her lifetime without leaving issue. An interest of that kind would have been devisable under the Statute of Wills; *Jones v. Roe* (a); and would pass to the assignees in bankruptcy; *Higden v. Williamson* (b); and though it did not therefore follow that it would be assignable at law by deed, yet no doubt could be entertained that it was so assignable in equity if supported by a valuable consideration; *Douglas v. Russell* (c); *Hinde v. Blake* (d); and, if so, why should it not be so assignable without consideration? It was clear from *Sloane v. Cadogan*, that a vested equitable interest might be so assigned: and *Wright v. Wright* (e) was an instance in which an assignment even of the possibility of an expectant heir had been upheld in equity, although supported only by a meritorious consideration, which for this purpose was the same thing as no consideration at all; *Dillon v. Coppin*. (g)

They also suggested that if the Court should be of opinion that the deed was not a complete assignment of the

(a) 3 T. R. 88.

(b) 3 P. W. 151.

(c) 4 Sim. 524.

(d) 3 Beav. 234.

(e) 1 Ves. 409.

(g) 4 M. & C. 647.

the interest, it might take effect as a constructive declaration of trust; *Ex parte Pye (a)*; but this point was not much pressed.

1843.

 MEEK
 v.
 KETTLEWELL.

Mr. *Bethell*, Mr. *Wilbraham*, and Mr. *Willcock*, for the respondent, said that the fallacy of the argument on the other side consisted in reasoning upon certain technical terms, which were adopted in Courts of Equity by analogy only, as if they were to be taken in the proper and literal sense which they bore in Courts of Law. It was true that in loose and familiar language it was sometimes said that choses in action, though not assignable at law, were assignable in equity: the fact, however, being that they were not, strictly speaking, assignable in equity any more than at law; but that a court of equity would, in favour of the intent, treat what purported to be an assignment as an agreement to assign, and would deal with it upon the same principles on which it was in the habit of dealing with agreements in general; that is, it would enforce it when supported by a valuable consideration, but not otherwise. The same explanation was to be given of those cases in which property to be after acquired, or possibilities whether legal or equitable, were familiarly but inaccurately spoken of as being assignable in equity though not at law.

With respect to the doctrine incidentally laid down by the Vice-Chancellor in his judgment, and which had been questioned on the other side, it might be admitted, without prejudice to the present argument, to be too broadly stated; for, even supposing that in a case where the subject-matter of the assignment, though an equitable interest, was nevertheless of such a nature
 as

(a) 18 *Ves.* 140.

1843.

 MEEK
 v.
 KETTLEWELL.

as that if it were legal, it would be assignable at law, a Court of Equity would, on the principle that equity follows the law, treat it as an actual assignment in the proper sense of the word, and accordingly give effect to it even without a valuable consideration, still no such principle could apply to a case like the present where the subject-matter, had it been legal, would have been incapable of assignment at law, being, in fact, nothing more than a mere possibility.

The Solicitor-General, in reply, referred to *Ex parte South (a)* and *Blakely v. Brady. (b)*

Dec. 6.

The LORD CHANCELLOR.

This was an appeal from a decree of Vice-Chancellor *Wigram*: the facts of the case are fully stated in the printed report of his Honor's judgment.

The question depends on the effect of the deed of assignment, of the 10th of *September* 1839, executed by Mrs. *Kettlewell* the Defendant. At the date of the execution of that instrument her interest was this: In the event of her daughter dying in her lifetime without leaving issue, she would become entitled, under the trusts of her husband's will, to 11,000*l.*, subject to a small deduction, as the next of kin of her daughter. During the lifetime of her daughter she assigned this expectant interest to the Plaintiff, in trust, as to a part of it, for herself, and as to the residue, in trust for the Plaintiff for his own use and benefit. (c) The daughter afterwards

(a) 3 *Swanst.* 392.

(b) 2 *D. & Walsh.* 311.

(c) The deed also contained the usual power to the Plaintiff,

upon the death of the daughter without leaving issue, to demand the money from the trustees, and to give an effectual receipt for it.

afterwards died without leaving issue, and the Defendant, as the next of kin of her daughter, became entitled to the fund in question, which was in the hands of trustees under her late husband's will. The bill was filed against the widow and the trustees, to enforce the performance of the trusts of the deed of assignment.

1843.
MEEK
v.
KETTLEWELL.

It is not disputed in this case that the assignment was purely voluntary. But the assignment of an expectancy, such as this is, cannot be supported unless made for a valuable consideration. If there is such a consideration a court of equity will give effect to it. Thus, in *Grey v. Kentish* (a), Lord Hardwicke is reported to have said, "A husband cannot assign in law a possibility of the wife, nor a possibility of his own; but this Court will, notwithstanding, support such an assignment for a valuable consideration." And again, in *Chauncy v. Graydon* (b), he says, "Though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable." The deed, therefore, being in this case merely voluntary, it was as an assignment altogether inoperative; and the only remaining question will be, whether, although void as an assignment, it is effectual as a declaration of trust.

The residue is assigned to the Plaintiff in trust for himself, &c. There can be no difference between an assignment to the Plaintiff in trust for himself and an assignment to him simply. The assignment fails, and with it the trust. If such an assignment be inoperative it does not convert the assignor into a trustee for the assignee. It has been repeatedly decided that where a gift is intended, as in the present case, and it is imperfect or ineffectual,

(a) 1 *Atk.* 280.

(b) 2 *Atk.* 616. See 621.

1843.

MEEK
v.
KETTLEWELL.

effectual, this cannot be converted into a declaration of trust so as to make the donor a trustee for the donee. The authorities are conclusive upon this point. The cases of *Antrobus v. Smith* (a) and *Edwards v. Jones* (b) were cases of imperfect gifts. It was contended that the donors were trustees for the donees. But in both cases the Court held that an incomplete gift would not operate as a declaration of trust. The judgment of Sir *William Grant* on this point, in *Antrobus v. Smith*, is conclusive in the reasoning. It is stated fully by Lord *Cottenham* in *Edwards v. Jones*, and it is unnecessary to repeat it. In *Sloane v. Cadogan*, which was so much relied upon in the argument, *Bromley Cadogan* had a vested interest in the property assigned; he conveyed it by a voluntary deed to trustees in trust for the Earl his father. Sir *William Grant* considered that a trust was thereby created, and upon that his judgment was rested. It is obvious, however, that that case is very distinguishable from the present, which is the assignment of a mere expectancy, that conveys no estate or interest to the assignee, although when made for a valuable consideration, which is wanting here, it would be supported in equity. I am of opinion that the judgment of the Vice-Chancellor was correct, and that the appeal ought to be dismissed. The appellant must pay the costs.

(a) 12 *Ves.* 39.

(b) 1 *M. & C.* 226.

1844.

LANCASTER v. EVORS. (a)

1842.
Nov. 18, 19.
26.

1844.
Jan. 13.


THE LORD CHANCELLOR.

Sir John Powell Price mortgaged to the Marquis of Buckingham certain estates which he possessed in the county of Montgomery for the sum of 24,000*l.* A suit with respect to that mortgage was instituted by the Marquis of Buckingham against Sir John Powell Price; in the progress of that suit the estate was sold, and the sum for which it sold exceeded the amount of the debt: that excess, which amounted to 2800*l.*, or thereabouts, was paid into Court in the cause of *The Marquis of Buckingham v. Price*. By the lapse of time, and by successive accumulations, that sum of 2800*l.* now amounts to upwards of 20,000*l.* 3 per cent. consols, and it is now in Court. *Evors*, the Defendant, is the heir-at-law of Sir J. P. Price. Sir J. P. Price was much embarrassed in his circumstances, and there were many outstanding judgments against him. *Evors* has purchased up these judgments; and he contends that he is entitled to the benefit of them, with respect to this sum that is now in Court. That is the position of the Defendant *Evors*.

The rule that a defendant who answers is bound to answer fully, is not affected by the decision in *Adams v. Fisher*.

The Plaintiff sues as personal representative of a judgment creditor of Lady Price, the wife of Sir J. P. Price, and her personal representatives are made parties Defendants. The bill states that Lady Price, during her lifetime, joined with her husband in conveying a real estate


(a) The reporter was absent during the argument.

1844.

LANCASTER
v.
EVORS.

estate of which they were seised in her right, as collateral security for the payment of a debt due from Sir *J. P. Price* to one *Jaques*; and that that debt, which originally amounted to 1500*l.*, but was ultimately increased by the accumulation of interest to the sum of 5000*l.*, instead of being paid, as it is contended that it ought to have been, out of the estate of Sir *J. P. Price*, which was included in the same security, was, after the death of Lady *Price*, paid out of her estate. Under these circumstances, it is contended that the estate of Lady *Price* is entitled to be reimbursed the amount so paid to *Jaques*, out of the estate of Sir *J. P. Price*; that is, out of this sum of 20,000*l.*, which represents that estate; and that the Plaintiff is entitled to have that amount, when recovered from the estate of Sir *J. P. Price*, made available for the satisfaction of his demand, there being no other assets of Lady *Price* to which he can resort for that purpose.

Such being the equity which the Plaintiff asserts by his bill, he alleges that the outstanding judgments against the estate of Sir *J. P. Price* were purchased by *Evors* for small considerations; and he interrogates him as to whether or not he has purchased these judgments; and if he has purchased them, for what consideration. *Evors*, in his answer, admits that he has purchased these judgments, but he says he is a purchaser of them for a valuable consideration, without any notice of the lien claimed by Lady *Price*, or the persons who represent her; and he submits that he is not bound, therefore, to answer as to that part of the interrogatory which relates to the sums that he has paid for these incumbrances. Upon this the Plaintiff excepted to the answer, and the exception was allowed by the Master; it afterwards went before the Master of the Rolls, who confirmed the decision of the Master, and it has now
come

come by appeal to this Court. The question is, whether that exception was properly allowed by the Master.

1844.

 LANCASTER
 v.
 EVORS.

Now there is no principle more clearly established, as I understand it, in the Court than this — that when a party answers he is bound to answer fully. If he has a defence against the equity set up by the Plaintiff, and he wishes to avail himself of that defence without making any discovery as to facts that are alleged in the bill, he must avail himself of that defence, according to the nature of the case, either by demurrer or by plea. I consider that as a settled rule. Formerly it was considered a doubtful question, and different opinions prevailed; but after the strong opinions expressed by Lord *Eldon* on this point, particularly in the case of *Rowe v. Teed* (a), and the case of *Somerville v. Mackay* (b), the question seems to have been considered by the profession as settled: and, accordingly, afterwards when it came before Sir *John Leach*, in the case of *Mazzaredo v. Maitland* (c), he stated that he was present when Lord *Eldon* expressed his opinion in *Somerville v. Mackay*; that he considered Lord *Eldon* intended to lay down the rule, that when a party under these circumstances answered, he must answer fully, and that that was the rule to which he should always adhere. Afterwards, in — v. *Harrison* (d), which was a case of partnership where the Defendant denied the partnership, and therefore refused to set out the accounts, Sir *John Leach* stated that he considered the point as settled, that if the party answered he was bound to answer fully; that if he did not choose to set out the accounts he ought to have pleaded; and he allowed the exception.

I consider

(a) 15 *Ves.* 372.
 (b) 16 *Ves.* 382.

(c) 3 *Mad.* 66.
 (d) 4 *Mad.* 252.

1844.

 LANCASTER
 v.
 EVORS.

I consider, therefore, the rule as settled, and for this, among other reasons, that if the defence which a party sets up by the answer should be decided against him, it is of the utmost importance that all consequential matters which are material for the purpose of the decree should receive an answer.


It was for some time considered an exception to the rule when the defence was a purchase for valuable consideration without notice; but in the case of *Ovey v. Leighton (a)*, where that point came distinctly before Sir *John Leach*, he said that it fell within the same principle, and he decided accordingly: and afterwards the present Vice-Chancellor of *England*, in the case of the *Earl of Portarlington v. Soulby (b)*, acted upon that decision. I consider, therefore, that this is no longer to be considered an excepted case, and that a party whose defence is that he is a purchaser for valuable consideration without notice, cannot, if he chooses to make that defence by his answer, refuse to answer consequential matters; and that if he wishes to protect himself from that necessity, he ought to avail himself of the defence by plea or by demurrer.

I consider this point so clearly settled that I have come to the conclusion that this appeal would never have been brought had it not been for the decision of Lord *Cottenham* in *Adams v. Fisher*, which was so much relied on at the bar, and which has been subjected to so much criticism; but after a careful review of that case, I do not think that it was the intention of that learned person to break in upon the rule which I have stated. The case did not come before the Court upon an exception to the answer, but upon a motion for the production

(a) 2 S. & S. 234.

(b) 7 Sim. 281.

production of documents: and that it was upon the ground of that distinction that the decision rested is, I think, evident from several passages in the report.

1844.

 LANCASTER
 v.
 EVORS.

The argument, it appears, was, that, by setting out a list of the documents in the schedule, the Defendant had incorporated them in his answer; and that unless he brought himself within some one of the grounds of protection, such as that the documents were of a privileged character, he must produce them. In answer to that, however, the Lord Chancellor says, "What the bill requires is not the contents of the documents, but a list of them. You cannot except to the answer, because the contents are not set out. You may ask the Defendant by your bill to set out the contents, and then he may make his defence." Then, afterwards, when he comes to deliver his judgment, he says, "All that the Plaintiff asks is, that the Defendant may set forth a schedule of the documents. Can you except because he has set out the documents in the schedule instead of in the answer? You did not ask that the contents should be set out. If that had been asked, the Defendant must have defended himself in the regular way, and shewn that he was not obliged to comply with your demand:" (there, as it appears to me, he adopts the general rule,) "but," he continues, "if the Defendant sets them out (*i. e.* the list merely) in the schedule to his answer, the question is upon the whole record, whether the Plaintiff has such an interest in them as entitles him to call for their production. Here, the Defendant has denied the Plaintiff's interest; he has upon the record stated that which, as it stands, in my opinion, excludes the Plaintiff from instituting this suit against him."

I think it is plain, from these passages, that Lord Cottenham considered that the application then made to him

1844.

 LANCASTER
 v.
 EVORS.


him stood upon different grounds from an exception to an answer. What I understand him to say is this: “If you had asked by your bill for the contents of the documents, and the Defendant had refused to set them out, and you had come here upon exceptions to the answer, the case might have been different: but you have not excepted to the answer, nor could you, for the answer goes to the full extent of what is required by the bill; but you come by way of motion, that the documents may be produced. Now, that is not a motion of course, but one on which the Court will exercise its discretion; and if, upon the whole record, the Court is satisfied that it would not be proper that the documents should be produced, it will refuse the motion.

Such was the distinction drawn in that case; and it was upon that distinction that the judgment rested. The distinction, I am aware, has been the subject of criticism by persons of deep learning and great research; but it is unnecessary for me to pursue that criticism, or to say whether or not it was well founded. It is sufficient for me to say, that as Lord *Cottenham* expressly drew the distinction, I am at liberty to infer that he never intended, by his decision, to break in upon the rule which had been laid down, and so long and so uniformly acted upon — that when a party answers he bound to answer fully.

On that ground alone, therefore, if there were no other, I should be of opinion that the exception was properly allowed.

But there is also another ground to which I shall very shortly advert, and which is this: The Defendant is the heir-at-law of Sir *J. P. Price*; and an heir-at-law buying in incumbrances purchases them for the benefit
of

of the estate (*a*): it is therefore wholly immaterial whether at the time when he made the purchase he knew that there was an outstanding claim against the estate or not; for, having purchased for the benefit of the estate, he is not entitled to more than the sums which he actually paid. The defence of his being a purchaser for valuable consideration without notice is therefore inapplicable to this case; and the answer to the question, how much he paid for the incumbrances, is of the very essence of the suit.

1844.

 LANCASTER
 v.
 EVORS.

But I do not rest my decision on this ground, for I think it is so important to the profession that the rule to which I have adverted should not be supposed to have been trenched upon by the decision in *Adams v. Fisher*, that I choose to decide the case upon the former ground. The appeal must be dismissed, and with costs.

Sir Charles Wetherell, Mr. Roupell, and Mr. Sheb-
beare appeared for the appellant.

Mr. Purvis, Mr. Bagshawc, and Mr. Malins for the
 respondent.

(*a*) See *Brathwaite v. Brath-* *Springfield, ibid, 476.; Morret*
waite, 1 Vern. 334.; Williams v. *v. Paske, 2 Atk. 52.*

1843.

1843.
March 24. 29.
April 7. 8. 22.

PARKER v. MARCHANT.

A testator's
 balance at his
 banker's held,
 upon the con-
 struction of
 his will, to
 pass under the
 words "ready
 money."

THIS was an appeal from part of a decree of Vice-Chancellor *Knight Bruce*. (a)

One of the questions raised by the appeal was:—
 Whether a gift in the testator's will of "all the rest and residue of my ready money, securities for money, and monies in the funds," passed, under the words "ready money," two balances of 6024*l.* and 16,615*l.*, which at the time of the testator's death were standing to his credit at his country and town bankers' respectively; it appearing from the Master's report that he had also at the time of his death a sum of 116*l.* cash in his house.

The Vice-Chancellor decided the question in the affirmative.

The material context of the will, (which is set out at length in 1 *Y. & Coll. N.S.* 290.), may be collected from the Lord Chancellor's judgment.

The appeal now came on to be heard.

Sir Charles Wetherell, *Mr. Tinney*, and *Mr. Lovat* appeared for the appellant, who was the general residuary legatee.

The Solicitor-General, *Mr. Simpkinson*, *Mr. Bethell*, *Mr. K. Parker*, *Mr. Whitmarsh*, *Mr. Koe*, *Mr. Lovat*, *Mr. Willcock*, *Mr. Hall*, *Mr. Boyle*, *Mr. Hood*, *Mr. Whatley*,

(a) See 1 *Y. & Coll. N. S.* 290.

Whatley, Mr. *Tripp*, and Mr. *Pitman* appeared for different parties in support of the decree.

1848.
PARKER
v.
MARCHANT.

Mr. *Wigram* for the trustees.

In support of the appeal it was contended that a balance at a banker's was a thing so remote from the meaning of the words "ready money," in their strict and primary sense, that it could not pass under them in any case, except where there was no other money which would answer the words, or where the context of the will necessarily required such a construction; which, it was submitted, was not the case here. Such a balance, it was argued, is in contemplation of law, a debt due from the banker; *Devaynes v. Noble* (a); *Sims v. Bond* (b); and cannot, in any proper sense, be called money, still less ready money: accordingly, in *Carr v. Carr* (c), Sir *William Grant* held that it would pass under the word "debts," assigning, as the express ground of his decision, that it would not pass under the term "ready money." Money, in its primary and legal sense, means the current coin of the realm, and ready money that which a person has in his purse or in his house. It was once doubted whether even bank notes would pass as money: Lord *Hardwicke*, in *Chapman v. Hart* (d), decided that they would; but that was because they were part of the currency, and equivalent, in all respects, to metallic coin, which a balance at a banker's is not. As long as the term ready money is restricted to the money which a man keeps in his house for current expenses, it has a definite meaning; for such a sum would not greatly vary in amount from day to day: but to attribute to it, on slight grounds, so
extended

(a) 1 *Meri.* 529. See p. 568. (c) 1 *Meri.* 541. n.
(b) 5 *B. & Ad.* 389. See (d) 1 *Vez.* 271.
p. 393.

1848.

 PARKER
 v.
 MARCHANT.

extended a sense as to include a person's balance at his banker's would introduce the greatest uncertainty, and, in a commercial country especially, would, in a majority of cases, defeat the whole scheme of a testator's will. Suppose, for instance, the case of a merchant having acceptances to the amount of many thousands of pounds, which were approaching to maturity and payable at his banker's; he would naturally take measures either for increasing his balance there or for obtaining a credit with his banker to meet the demand. According to this decision, if he were to die a few days before the bills became due, a gift of ready money in his will might sweep away more than half of his property. The same result would happen in the case of an agent who should enter the money received by him in that character to his private account with his banker, and should happen to die a few days before the periodical settlement of his accounts with his principal; or in the still more common case of an individual who should be in the habit of providing a fund at his banker's at a particular season of the year for the payment of his ordinary tradesmen's bills.

The rest of the argument consisted chiefly of comments on the cases which were cited in the Court below, the most important of which are noticed by the Lord Chancellor in his judgment. The case of *Hastings v. Hane* (a) was also referred to.

April 22.

The LORD CHANCELLOR.

The first question raised by this appeal was, whether or not, under the description of "all my ready money,"
 the

(a) 6 Sim. 67. See also *Brooke v. Tanner*, 7 Sim. 671.

the balance of the testator at his banker's at the time of his death would pass.

1843.
PARKER
v.
MARCHANT.

It is material for the consideration of that question to advert to the frame of the will. The testator divides his property into three classes: first, his ready money, securities for money, and money in the funds; secondly, his real property; thirdly, his jewels, plate, wine, carriages, and property of that description, goods, chattels, and effects. Nothing can be more marked than this division of the property; and it seems, therefore, to have been the intention of the testator, under the first head, namely, "all my ready money, securities for money, and money in the funds," to include money in whatever shape or form it might present itself.

There is another view, also, that has struck me with respect to the construction of this will, which is this: The testator begins by directing his debts to be paid. He then gives very large legacies of stock. This is followed by a disposition of pecuniary legacies to a very considerable amount, of 500*l.* each to several persons, making in the whole a pecuniary disposition of many hundreds of pounds. Immediately after this pecuniary disposition he says, "All the rest and residue of my ready money I dispose of," so and so. He seems, therefore, to have considered that he had already disposed of a part of his ready money. That part of his ready money so disposed of was too large to be considered as money in the house; and he seems therefore to have considered that under the description of ready money some other fund must be included, and that fund could only have been the balance at his banker's. I think, therefore, on the frame of the will itself there is reason, and strong reason, to conclude that it was the intention of the testator that the money at his banker's should pass.

The

1843.

PARKER
v.
MARCHANT.

The question therefore is, whether the terms he has used are sufficient for that purpose. Now, in construing a will of personal property, the terms that are used in the will are to be construed according to the ordinary acceptation of language in the transactions of mankind; and nobody can doubt that, in the ordinary use of language, money at a banker's would be considered as ready money. Every body speaks of the sum which he has at his banker's as money: "my money at my banker's," is a usual mode of expression. And if it is money at the banker's, it is emphatically ready money, because it is placed there for the purpose of being ready when occasion requires: it is received upon the understanding that it shall be so ready. If a man goes to his banker, the money is counted out to him on the table. If he sends an order for the money, it is counted out to his servant, or the person in whose favour that order is made. I consider, therefore, that it is strictly ready money according to the ordinary acceptation of those terms among mankind.

As it appears, therefore, for the reasons I have stated, to have been the intention of the testator that these sums should pass under this clause, if the terms which he has used are sufficient for that purpose, construing those terms according to the ordinary use of language in the transactions of mankind, I am of opinion that they would so pass.

As to the authorities that have been cited, they have been so fully sifted and discussed at the bar, that it is not necessary to enter very minutely into the consideration of them. The first was the case of *Carr v. Carr*. In that case the testator bequeathed to the plaintiff all the debts that should be owing to him; and the question was,

was, whether, under the description of debts owing to him, the balance at his banker's would pass. Sir *William Grant*, after some hesitation, was of opinion that the balance at the banker's would pass under the description of a debt owing to the testator. He said, and I think he justly said, it is a debt, and may be recovered as a debt; and five or six years afterwards, in the decision of *Devaynes v. Noble*, he held the same language, upon the same principle—that the balance at the banker's is a debt due to the party who deposits the money. The money is not to be returned in specie; the engagement is, to be ready to pay an equal amount when called for: and on the same principle, in the case of *Sims v. Bond*, the Court of Queen's Bench, quoting the authority of *Devaynes v. Noble*, decided that it was a loan,—a debt. Sir *William Grant*, under these circumstances, there being a distinct disposition or bequest of debts owing to the testator, and this being in point of law a debt, and there being nothing to restrain the operation of it or to shew a contrary intention on the face of that will, decided, after some consideration, that the banker's balance would pass under the description of a debt; and nobody can question the correctness of that decision. In the course of his judgment he said it would not pass under the description of ready money. That was not necessary for the decision, although he founded an argument upon it; but it does not appear from any thing that he stated upon that occasion, assuming the report to be correct, that if there had been sufficient on the face of the will to manifest an intention that the balance at the banker's should pass under the description of ready money, he would not have given effect to it. Those are the observations arising out of the case of *Carr v. Carr*.

1843.

 PARKER
 v.
 MARCHANT.

But

1843.

 PARKER
 v.
 MARCHANT.

But the case of *Vaisey v. Reynolds* (a), as it appears to me, is directly in point; the circumstances were nearly similar, they were, at all events, similar in principle, to those of the present case. The testator bequeathed to his wife his book debts, his monies in hand, and his stock in trade. To his executors he bequeathed his money upon mortgage or other security, and money in the funds. Sir *John Leach*, upon a view of the will, was of opinion that it was the intention of the testator, under one or other of these descriptions, to dispose of every thing that could be considered fairly as money. That was the ground and basis of his decision. In no sense, he said, could the balance at the banker's be considered as money on security; but, in a reasonable sense, it might be considered as money in hand, for it was to be ready when called for. That case, therefore, is a distinct authority for the present decision, for I think there is no real difference between money in hand and ready money.

The remaining case was *Taylor v. Taylor* (b), before the present Master of the Rolls, in which the question arose upon demurrer, and on the ground that a balance at a banker's would, in its ordinary acceptation, be considered as ready money, he decided that, in the will before him, it passed under that description.

Sir *Charles Wetherell*, in his very able argument, suggested difficulties that might arise in particular cases, by considering the words "ready money," in a will, as embracing the testator's balance at his banker's. Those circumstances would deserve to be considered by the Court, for the purpose of forming a conclusion as to what was the intention of the testator in the particular case in which they might happen to exist. But in the
 present

(a) 5 *Russ.* 12.

(b) 1 *Jur.* 401.

present case there is no such difficulty. The sums in question were balances upon ordinary banking accounts. It does not appear that any interest was payable upon them, or that they were subject to any limitation, restriction, or condition of any description; nor does it appear that the sums, though large, were larger than the average sums usually kept at his banker's by this very wealthy individual; and therefore it is one of the plainest cases that can be conceived of an ordinary deposit at a banker's: and, considering it as such, I am of opinion, for the reasons I have already stated, that the judgment of the Vice-Chancellor was correct.

1843.
PARKER
v.
MARCHANT.

LANE v. BARTON.

Oct. 3.

THE day after the Courts had risen for the Long Vacation, the Plaintiff obtained the common injunction for want of an answer. The Defendant then put in his answer, and obtained from Vice-Chancellor *Wigram* (the Vacation Judge) an order *nisi* to dissolve the injunction; and on the 31st of *August*, the day appointed by that order for shewing cause, the Plaintiff not appearing, the order was made absolute upon the usual affidavit of service.

The common injunction may be dissolved in the Long Vacation.

Mr. *Cooke*, for the Plaintiff, now moved before the Lord Chancellor to discharge the order *nisi* and the subsequent order of the 31st of *August*, for irregularity: contending that according to the old practice the common injunction could neither be granted nor dissolved on any day but a seal day, and that although that prac-

1843.

LANE
v.
BARTON.

tice was no longer adhered to with respect to granting injunctions, the innovation had gone no further, and that the common injunction whenever obtained could be dissolved only on a seal day.

Mr. *Whatley*, *contra*, cited *Fielding v. Capes*. (a)

The LORD CHANCELLOR said that the Court of Chancery was always open both for granting and dissolving injunctions, and that it was competent to the Court to appoint any day for hearing a motion that the Judge might think fit. His Lordship added, that it would be most unjust that a party, having obtained judgment at law, should be prevented from issuing execution during the whole of the Long Vacation, notwithstanding he had put in a full answer denying all the equity of the bill.

Motion refused with costs.

(*Ex relatione* Mr. *Whatley*.)

(a) 4 *Madd.* 393.

1844.

March 28, 29.


LORD HARBOROUGH v. WARTNABY.

All motions of course may be made out of term as well as in term, on any day, whether a seal day or not.

MR. *MALINS*, for the Plaintiff, had obtained an order *ex parte* from the Lord Chancellor on a day out of Term and not a seal day, for one of the Defendants to produce certain documents before the Master pursuant to the decree, within four days, or in default thereof that the Serjeant-at-arms should go.

Mr.

Mr. *Wakefield* now moved to discharge that order for irregularity, on the ground that it was contrary to the practice of the Court to make orders of course, particularly where they affected the liberty of the subject, on any day out of Term except a seal day. *Saxby v. Saxby* (a), *Sharp v. Ashton*. (b)

1844.

 Lord
 HARBOUROUGH
 v.
 WARTNABY.

Mr. *Anderdon* and Mr. *Malins*, *contra*, cited *Brierley v. Walmsley* (c), *Earl of Chesterfield v. Bond* (d), and *Reece v. Humble*. (e) They also stated that since the report of *Saxby v. Saxby* was published, the Vice-Chancellor of *England* had questioned its accuracy, and disclaimed the opinion which he was there represented to have expressed.

The Registrar (Mr. *Colville*) also mentioned the four day order in the case of *Parsons v. Parsons* cited in *Seton on Decrees*, p. 240., and stated that the order for the Serjeant-at-arms subsequently made by Lord *Hardwicke* in consequence of the first mentioned order having been disobeyed, appeared, from the Registrar's Book, to have been made out of Term, and on a day not a seal day.

Mr. *Wakefield*, in reply, insisted that inasmuch as all the modern cases cited on the other side had proceeded upon the 10th Order of *December* 1833, which applied only to the common injunction, they were exceptions which proved the rule for which he contended.

The LORD CHANCELLOR said he would consult with the other branches of the Court before he disposed of the case.

On


(a) 7 *Sim.* 140.

(b) 2 *V. & B.* 412.

(c) 1 *Keene*, 141.

(d) 2 *Beav.* 263.

(e) 10 *Sim.* 117.

1844:

 Lord
 HARBOROUGH
 v.
 WARTNABY.


On the following day his Lordship said,

The question argued before me yesterday was, whether the motion for a four day order, which is a motion of course, could be made, out of Term, on a day not a seal day. It is clear, the old rule was, that such a motion could not be made out of Term except on a seal day, although in Term it might be made on any day. The rule was so laid down by Lord *Eldon* in *Sharp v. Ashton*, and, indeed, it was carried so far that even where the seal was continued for three or four days, it was not competent to make such a motion unless the counsel was instructed on the first day of the seal.

Such was the practice at the time when *Sharp v. Ashton* was decided. I place no reliance on the decision in the time of Lord *Hardwicke*, first, because it does not appear that the point was discussed; secondly, because the contrary rule has been distinctly laid down by Lord *Eldon*. The question then is, whether that practice has since been departed from. In the case of *Brierley v. Walmsley* it was departed from under particular circumstances. The question there arose upon an order for the common injunction, and the decision was rested expressly upon the ground and principle of the 10th Order of *December* 1833: I consider it therefore an affirmance of the general rule. The same question came before Lord *Cottenham* in the case of *Lord Ferrers v. Fisher (a)*; but it was not necessary to decide it, because the party had precluded himself from taking advantage of the irregularity (if any) by his own conduct; the point of practice therefore was not decided. The question, however, came again before the Master of the Rolls in the case of *Lord Chesterfield v. Bond*.

(a) 1 *Kcene*, 144. n.

Bond ; and it is material to consider that decision, and the ground of it. That decision did not proceed upon any general order, but, on analogy to what had been decided with respect to the common injunction for want of an answer. The injunction in that case was for want of appearance ; but, from analogy and on the ground of convenience, the Master of the Rolls thought it might be had on a day not a seal day. ' .

1844.

 Lord
 HARBOROUGH
 v.
 WARTNABY.

I think that analogy may with propriety be extended farther, and that the same principle of public convenience which guided the decision of the Master of the Rolls in that case applies equally to the present, and warrants me in laying it down as a general rule of practice for the future, that motions of course may be made, out of Term as well as in Term, on any day, whether a seal day or not.

I have communicated on the subject with the Vice-Chancellor of *England*, Vice-Chancellor *Knight Bruce*, and the Master of the Rolls, and they all agree with me in thinking that the analogy to which I have referred ought to be extended to all cases. Public convenience is obviously in favour of such a course, and in the present circumstances of the Court I see no reason against it.

I shall therefore refuse the motion to discharge this order ; but, as there has been no previous decision upon the point, without costs.

1843.

1843.
Dec. 17.

ZULUETA v. ARDOUIN.

Leave given under particular circumstances to a Defendant, whose answer had been reported insufficient, to set down exceptions to the report for argument, notwithstanding he had been served with an order giving the Plaintiff leave to amend, and requiring the Defendant to answer the exceptions and amendments together.

THE Master having made his report, allowing exceptions to an answer, between one and two o'clock on *Saturday* afternoon, the Defendant filed exceptions to the report, and gave the Plaintiff notice thereof, in the course of the same day. At ten o'clock on *Monday* morning the Plaintiff served the Defendant with an order, obtained at the Rolls, for leave to amend, and that the Defendant should answer the exceptions and amendments together, notwithstanding which the Defendant afterwards, and in the course of the same day, obtained and served an order to set down the exceptions. The Plaintiff thereupon moved before the Vice-Chancellor of *England* that the last-mentioned order might be discharged and the exceptions taken off the file with costs: and his Honor having made an order accordingly, the Defendant now moved by way of appeal before the Lord Chancellor that that order might be discharged, and that the order for leave to amend &c. might be discharged with costs, or that the exceptions might remain on the file and the Defendant be at liberty to take such steps as might be necessary for the purpose of having them heard by the Court, and that, if necessary, the order for leave to amend &c. might be discharged, varied, or suspended until final decision upon the exceptions.

Mr. *Russell* and Mr. *Giffard* for the appeal motion.

The rule of practice supposed to have been laid down by Lord *Eldon* in *Farquharson v. Balfour* (a), and on which the Vice-Chancellor's order proceeded, was not intended

(a) *Jac.* 587.

intended by Lord *Eldon* to be so rigorously applied as it has been in the present case; and, at all events, his Honor has enforced it too harshly by giving the Plaintiff the costs of his motion. In *Farquharson v. Balfour* the Defendant had been contumacious, and was guilty of great laches: and though it is true that in the recent case of *Lord Glengall v. Bland*, where there was no laches, Vice-Chancellor *Wigram* considered himself bound by Lord *Eldon*'s rule, yet his Honor, in consideration of the strictness of the practice, refused costs to the party who sought to avail himself of it. It is evident that if the rule is to be rigorously enforced in a case like the present, no degree of diligence on the part of a Defendant will prevent the Plaintiff from depriving him of his right to appeal from the Master's decision; for the Plaintiff may obtain his order immediately upon the report being filed, whereas the Defendant cannot apply for his, until he has also filed exceptions to the report.

1848.
ZULUETA
v.
ARDOUIN.

Mr. Wakefield and Mr. Rogers, contra.

The LORD CHANCELLOR.

I observe, that in *Farquharson v. Balfour* Lord *Eldon* does not put it upon the particular circumstances of the case, but states what, upon inquiry, he had ascertained to be a general rule of practice. I think, therefore, that in that respect the Vice-Chancellor's order is right; and the only question upon this motion is, whether the Defendant is entitled to be let in to argue the exceptions. Now that is an indulgence which requires merits to be shewn, and the only merits in this case are, that the party was a little, and but a little, too late. If, however, I allow the indulgence on that ground alone, shall I not be virtually abrogating the rule?

1843.

Mr. Russell.

ZULUETA

v.

ARDOUIN.

The object of this, as of all rules of practice, is to guide the proceedings and to keep the parties to reasonable diligence; not to deprive either party of his right to take the opinion of the Court upon a decision of the Master.

The LORD CHANCELLOR.

I think I ought to let the party in on payment of the costs. The first part of the motion I must refuse with costs: the second alternative I shall grant, on payment of costs, on the ground that there has been so much diligence and activity on the part of the Defendant—that he has been beaten by so very little in what may not improperly be called a race between the parties—that he is entitled to indulgence. I may observe that the rules of practice appear to be adhered to with much more rigour here than in courts of law: I am sure that, in such a case as this, a court of law would have let the party in without any hesitation.

1843.

Jan. 25.

Nov. 11.


ROBERTS v. MARCHANT.

The only exception to the rule that the appellant is entitled to begin, is where a Defendant appeals from the whole of a decree.

THIS was a suit by the administrator of a vendor of real estate against the purchaser for specific performance of the contract of sale. The purchaser having by his answer suggested that the heir-at-law of the vendor was a necessary party, the Plaintiff set the cause

To a suit by the personal representative of a vendor of real estate for specific performance of the contract of sale, the real representative of the vendor is a necessary party.

cause down upon that objection, under the 39th Order of *August* 1841, and Vice-Chancellor *Wigram* having allowed the objection, the Plaintiff appealed from that decision.

1843.

 ROBERTS
 v.
 MARCHANT.

The appeal now coming on to be heard,

Mr. *Tripp* for the Defendant, claimed the right to begin on the ground that he had begun in the Court below, and that this was merely a rehearing of the cause upon the same objection.

Mr. *Wakefield* for the Plaintiff, contended that the case was analogous to an appeal from an order allowing a plea or demurrer, in which cases the practice was for the appellant to begin. (a)

The LORD CHANCELLOR.

It appears that the only exception to the rule that the appellant is entitled to begin, is where the Defendant appeals from the whole of a decree. And the reason for that exception I take to be this, that the Plaintiff may at the rehearing adduce new evidence, and shape his case differently; and it is therefore convenient that he should in all such cases begin, in order that he may state to the Court at once how he shapes his case. But that reason does not apply where the subject of the appeal is a particular objection to the frame of the suit. I think therefore, that in these cases the general rule should prevail, and that the appellant ought to begin.

Mr.

(a) For instances of this practice, see *Kay v. Marshall*, 3 *Myl. & Cr.* 373.; *Vernon v. Vernon*, 2 *Myl. & Cr.* 145.; *Attorney-General v. Mayor of Norwich*, 2 *Myl. & Cr.* 406.; *Ellice v. Goodson*, 3 *Myl. & Cr.* 653.

1843.

 ROBERTS
 v.
 MARCHANT.

Mr. *Wakefield* and Mr. *Rogers*, in support of the appeal.

The only proper parties to a suit for specific performance are those who were parties to the contract, or if they be dead, the parties who represent their rights under it, *Tasker v. Small*. (a) Now the right of a vendor under a contract for the sale of real estate is simply a right to the purchase money, and that right upon his death devolves upon his personal representative. His heir is as completely disinherited by the contract as he would be by a devise, or by a deed conveying the estate to a trustee for sale: and yet it is clear that to a bill for specific performance of a contract entered into by such devisee or trustee, the heir-at-law would not be a necessary party: for a vendor claiming under a will is not bound to establish the will against the heir, *Morrison v. Arnold* (b); still less is a trustee, under a deed in trust for sale by which real estate has been converted into personalty, bound, in a suit between himself and a purchaser, to make the heir of the grantor a party for the purpose of enabling him to contest the validity of the deed by which he is disinherited. The Vice-Chancellor assumed that if the vendor in this case had left a will devising the estate, the devisee would have been a necessary party to the suit. But in *Calvert on Parties* (c) from which his Honour appears to have adopted that proposition, the only case cited in support of it is *Townsend v. Champernowne* (d) which does not warrant it. For there, it was not the vendor but the purchaser who had devised the estate, and the suit having been revived against his executors only, the objection taken was, that his devisees were not made parties: which objection
of

(a) 3 *Myl. & Cr.* 63.

(b) 19 *Ves.* 673

(c) P. 293.

(d) 9 *Price*, 130.

of course prevailed, because the devisees were the parties who had succeeded to his interest under the contract. On the other hand there is an unreported case of *Williams v. Shaw* (a) before Sir *J. Leach*, where upon the death of a vendor who had filed a bill for specific performance against the purchaser, his executors revived the suit before decree, without making his heir at law a party: and from a manuscript note of the case, *ex relatione* Mr. *Pepys*, with which we have been furnished by Mr. *Walker*, it appears that the objection was taken at the hearing, but that it was overruled.

1843.

 ROBERTS
 v.
 MARCHANT.

Mr. Tripp, contra.

Mr. Wakefield in reply.

The LORD CHANCELLOR.

Nov. 11.

This was a suit by the administrator of the vendor against the purchaser of an estate for a specific performance of the agreement of sale. The Defendant by his answer objected that the heir-at-law of the vendor ought to have been a party to the suit. The Vice-Chancellor *Wigram* allowed the objection. This is an appeal from that decision.

It was argued that by the contract the estate was converted into personalty, and that the heir-at-law had no interest in the matter. But that is to assume the very point in controversy, for the heir-at-law may dispute the contract and controvert its validity. It was further argued, that, as a general rule, it is not necessary to make parties to the bill those who are not parties to the contract: but that rule does not extend to representatives; and the heir-

(a) Reg. Lib. B. 1819. f. 1805.

1848.

ROBERTS
v.
MARCHANT.

heir-at-law is the representative of the vendor as to the realty.

The cases which were cited do not apply. The mortgagee, it is said, need not be a party in a suit by the mortgagor. But his interest is not affected by the sale, and on payment of the mortgage money by the purchaser it entirely ceases. So, as to the cases where the sale is by a person holding the estate under a conveyance or a devise; the heir-at-law of the grantor or devisor need not be made a party: he does not claim through, or in any way represent, the vendor. I agree with the Vice-Chancellor that the purchaser is not to be prejudiced by the death of the vendor, but is entitled to the same benefit from a decree as if it had passed against the vendor himself.

A case of *Williams v. Shaw* was cited in the course of the argument at the bar, in which the Vice-Chancellor is said to have decided, upon the objection being taken at the hearing, that the heir-at-law was not, in a case of this nature, a necessary party to the suit. That case was not mentioned in the Court below. Neither the argument at the bar, nor the reasons of the judgment, are stated. I do not think, if it had been referred to, it would, under these circumstances, have changed the opinion of that learned Judge in the present case. It has not altered mine.

Appeal dismissed.

1843.

In the Matter of the PRINCESS BARIATINSKI.

Dec. 21.

THIS was a Petition for a commission of lunacy. The lady, who was the subject of it, was the daughter of a *Russian* nobleman, and was born in *Russia* in the year 1807; but her mother, who was a daughter of Lord S., an *English* peer, having died in giving her birth, she was shortly afterwards sent over by her father to *England*, and committed to the care of her maternal grandmother and aunt, by whom she was accordingly brought up. Her father died in 1826; and in 1829, being about a year after she attained twenty-one, she exhibited symptoms of mental derangement, and soon afterwards became a confirmed lunatic, in which state, however, she continued to live under the care of her mother's family, without any application being made for a commission of lunacy, until the year 1843, when Prince *Bariatinski*, her half-brother, came over to this country, and claimed the custody and management of her person and property, insisting that by the laws of *Russia* he was entitled to it as the head of his family. In consequence of that claim this petition was presented by her maternal aunt, under whose care she was living; and the petition now came on to be heard together with a counter petition by Prince *Bariatinski*, which prayed that a commission might not issue, or if it did, that proper directions might be given as to who was to have the conduct of it; and that the petitioner might, in the meantime, be allowed access to the lunatic.

A commission of lunacy may issue against an alien.

The domicile of the party against whom a commission of lunacy is applied for, is not material to the question of jurisdiction, though it may be material to the question of discretion, if, for instance, the party has come here for a short time or for a particular purpose.

The fortune of the Princess was stated to consist of about 30,000*l.* in the *British* funds, and some real estate in *Russia*.

There

1843.

In re
The Princess
BARIATINSKI.

There being no dispute as to the fact of lunacy, the only questions were

First, as to the jurisdiction — having regard to the alienage of the Princess, and also to her domicile, respecting which there was a dispute whether it was *English* or *Russian*.

Secondly, supposing that a commission ought to issue, who was to have the conduct of it.

With respect to the latter point, it was stated in one of the affidavits that the lunatic had, in the year 1830, made a will in favour of her aunt, and that circumstance was urged as a ground for giving the conduct of the commission, if granted, to the Prince.

On the first question,

The LORD CHANCELLOR said; the domicile was immaterial to the question of jurisdiction, though it might be material to the question of discretion; if for instance the party had come here for a short time, or for a particular purpose.

With respect to the alienage,

It was admitted by the counsel who argued for the commission, that they had been unable to find any reported case in which an alien had been the subject of a commission of lunacy; but they contended that there was no reason for confining the benefits arising from the exercise of this branch of the royal prerogative to the Queen's subjects; and that in a case of undoubted lunacy the Lord Chancellor would always grant a commission where either the person of the party or any of his

his property was within the local limits of the jurisdiction. *Lady Marr's Case* (a); *Ex parte Southcot* (b); *In re Houstoun*. (c)

1843.

In re
 The Princess
 BARIATINSKI.

On the other hand it was insisted that by the law of *Russia* the Prince was entitled to the custody of his sister, and that the Lord Chancellor had no right to interfere with a party on whom a foreign jurisdiction had already attached. *Dean of St. Paul's Case*. (d) The following passages also were cited from *Vattel*. (e) "The state, which ought to respect the rights of other nations, and in general those of all mankind, cannot arrogate to herself any power over the person of a foreigner, who, though he has entered her territory, has not become her subject." "Any power which the lord of the territory might claim over the property of a foreigner would be equally derogatory to the rights of the individual owner, and to those of the nation of which he is a member."

[*The LORD CHANCELLOR.* That supposes that the proceeding is directed *against* the party: this is all for his benefit.]

It was then suggested that if a commission were to issue, and a committee of the estate were appointed, the members of Lord S.'s, family, who had hitherto had the management of the lunatic's property in this country, would be liable to account for the past income, both to the committee so appointed, and to the Prince as curator by the laws of *Russia*.

[*The*

(a) Cited in *Ex parte Annandale*, *Ambl.* 82.

(b) 2 *Vez.* 401.

(c) 1 *Russ.* 312.

(d) *Vin. Abr.* tit. *Lunatic*, (A. 3.)

(e) *Law of Nations*, B. ii. Ch. 8.

1843.

In re
 The Princess
 BARIATINSKI.

[*The LORD CHANCELLOR.* The Court would not allow them to be molested improperly. I think there is very great doubt whether, after a committee has been appointed and the property has become vested in him, the Court would permit any other party, claiming to represent the estate, to sue in that character.]

In the course of the argument the Secretary handed up to the Lord Chancellor a long list of cases in which commissions had issued against parties having foreign names, but in none of which it appeared whether the parties were aliens or not.

On the conclusion of the argument,

The LORD CHANCELLOR said :

I am satisfied, unless some authority can be cited to the contrary, that the Court has jurisdiction, and that it is its duty to throw protection around the person and property of an individual in this situation. The list of foreign names with which I have been furnished is not quite conclusive of the jurisdiction to grant a commission against an alien ; but it is very improbable that all those parties should have been subjects of this country. The Crown does not take possession of the lunatic's property for its own benefit ; but it takes it by its officers, for the purpose of applying the income to the party's maintenance and accumulating the surplus for him in case he recovers, or applying it according to the directions of his will, if he happen to have made one before he became insane. What can be more proper, what more humane, what more consistent with the general character of the law of *England*, than such a course ?

I think, therefore, a commission ought to issue ; and I see no sufficient reason why the aunt who has hitherto
 had

the care of the lunatic, should not have the conduct of it; but to guard against any thing improper, Prince *Bariatinski* shall have full opportunity of attending, and adducing such evidence as he may think necessary for the interest of the lunatic, and in the meantime he shall have access to her, (in company, of course, with the medical gentleman,) in order to prepare for the investigation.

1843.
In re
The Princess
BARIATINSKI.

The Solicitor-General, Sir Charles Wetherell, and Mr. Walpole appeared in support of the petition for the commission.

Mr. Stuart and Mr. Walford for the cross petition.

In the Matter of WILLIAM HOLLAND and in the
Matter of the stat. 56 G. 3. c. 60.

March 14,
15. 20.

THIS was a petition presented by *William Holland*, a lunatic, and by *John Sealey Townsend*, the committee of his estate, praying that the Master's report, made under the usual reference, which had been directed upon a former petition of the same parties, might be confirmed, and that a sum of 1400*l.* stock, which, in consequence of no dividends having been claimed for upwards of ten years, had, in the year 1841, been transferred under the provisions of the above mentioned Act from the name of the petitioner *William Holland* into the names of the Commissioners for the reduction of the national debt, might be retransferred into the name of the petitioner *J. S. Townsend*, as such

The taxed costs of the Attorney-General and the Commissioners for the Reduction of the National Debt, upon applications under the 56 G. 3. c. 60., are, in the absence of special circumstances, to be paid out of the fund recovered.

1844.

In re
HOLLAND.

March 14.

committee, and that all dividends due and unreceived thereon might also be paid to the same petitioner.

At the rising of the Court this day, Mr. *Wray*, as counsel for the Attorney-General and the Commissioners, asked leave to have the petition put in the Lord Chancellor's paper under the following circumstances:

On the hearing of the petition before Vice-Chancellor *Knight Bruce*, Mr. *Wray* had asked that the costs of the Attorney-General and the Commissioners might be ordered to be paid out of the stock and dividends which the petition sought to have transferred and paid, stating that such had been the uniform practice upon petitions of this kind ever since the act had passed; in support of which assertion he mentioned two unreported cases of *Ex parte Laferte* (a), and *Ex parte Ram* (b), in the latter of which Lord *Cottenham* had, on a similar application by the counsel for the Attorney-General and the Commissioners, caused an inquiry to be made into the practice, and had ultimately ordered the costs of those parties to be paid as was now asked. Mr. *Lloyd*, however, who appeared for the petitioners, having objected to such an order in the present case, the Vice-Chancellor declined to make it, observing that the Court had, under the statute (c), a discretion to make such an order or not as the justice of the case might require, and that as the statute gave the public the benefit of the accumulations upon the dividends of the stock from the time of its transfer into the names of the commissioners to the time of its being claimed by the owner, it was reasonable, in the absence of any special circumstances, that the costs of the At-

torney-

(a) V.-C., 22 April 1837.

(c) Sect. 5.

(b) L. C., 30 May 1838.

torney-General and the Commissioners who represented the public on these applications, should be paid out of the accumulations, and not out of the fund which the party recovered: but his Honour added that as it was represented that a contrary practice had uniformly prevailed, and as the question was one of considerable public importance, he would, if Mr. *Wray* wished it, suspend his judgment in order that an application might be made to the Lord Chancellor to hear the petition.

1844.

In re
HOLLAND.

The Lord Chancellor having granted the application, the petition now came on to be heard, when

March 15.

Mr. *Wray* observed that the statute, though undoubtedly a benefit to the public, was a still greater benefit to the claimant of the stock, who, but for the statute, would have had to file a bill against the Bank of *England*, and would then perhaps have recovered only the arrears of dividends for six years; whereas the statute enabled him, by a summary proceeding, to recover all the dividends, or the capital stock which had arisen from their investment; the accumulations upon such investment, which, but for the statute, would never have arisen, being all that was given to the public.

Mr. *Lloyd*, *contra*.

The LORD CHANCELLOR; on the conclusion of the argument, intimated an opinion in conformity with that of the Vice-Chancellor, observing that the statute had clearly given the Court a discretion upon the subject, but added that if it should appear that that discretion had always been exercised in one way, he should not be disposed to depart from the practice as so established, and that he would therefore direct an inquiry to be

C·c 2

made

1844.


In re
HOLLAND.

made for the purpose of ascertaining what the practice had been.

*March 20.**The* LORD CHANCELLOR.

The result of the inquiry that I have made is, that the practice has been uniform to allow the Attorney-General and the Commissioners their costs upon these applications, out of the stock and dividends recovered; and that no exception to that practice is any where to be found. Indeed, it can hardly be considered a hardship upon the petitioner: all that he is entitled to is the amount of the dividends which have accrued upon his stock since they were last claimed: the investigation of his claim is rendered necessary by his own laches; and, therefore, it is not unreasonable that he should pay the costs of it: after all, he only pays part of the costs, for they are taxed as between party and party, and the extra costs of the Attorney-General and the Commissioners are thrown upon the accumulations. The practice appears to have been established under Lord *Eldon*, and to have gone on without any variation under successive Chancellors ever since; unless, therefore, a very special case were made, I should not feel warranted in departing from it. The order, therefore, in this case must be in the form which that practice has established.

1844.

ATTORNEY-GENERAL v. RICKARDS.

February 29.
March 1.

THIS was an appeal from a decision of the Master of the Rolls, by which he had held that certain exceptions taken by the Defendant to the Information for impertinence, and which had been allowed by the Master, were not sustainable.

The information stated that *Frederick Engler*, one of the Relators, had recovered a judgment of outlawry against the Defendant *Arthur Annesley* in an action on a bond; that a writ of *capias utlagatum* had issued thereon, under which an inquisition had been taken, but that, in consequence of a deed which had been executed by *Annesley* after the issuing of the *capias*, conveying all his real estates to the two other Defendants, *Rickards* and *Walker*, on certain nominal and collusive trusts, the Sheriff had returned that *Annesley* was not seised of any lands within the county. The substance of the prayer was, that the Attorney-General, on behalf of her Majesty, might have the benefit in equity of the judgment of outlawry, and of the writ of *capias utlagatum* issued thereon; that the deed might be declared fraudulent and void as against the right and title of her Majesty under the said outlawry; and that the Defendants might account for the estates conveyed to them by the deed, and be restrained from receiving the rents.


Three of the passages excepted to were as follows.

“ That

In an information seeking to set aside a deed alleged to have been executed in fraud of proceedings under an outlawry, Held not impertinent to state that at the time of the execution of the deed the outlaw was residing at *Holyrood* to avoid his creditors, or that his object in executing the deed was to delay and defeat his creditors.

Though it is not necessary that the Relator in an information should have an interest in the subject of the suit, yet a statement, of only a few lines, shewing what interest the Relator had, was held not to be impertinent but mere surplusage.

Where the Master and the Court below had come to different conclusions upon exceptions for impertinence, the Lord Chancellor, in affirming the decision of the Court below, gave no costs of the appeal.

1844.

 The
 ATTORNEY-
 GENERAL
 v.
 RICKARDS.

“That by indenture of assignment, bearing date the 19th day of *August* 1833, the said *Frederick Engler* for good and valuable consideration, duly assigned the said bond, and all principal monies and interest due or to become due thereon, unto *John Stulz* and *Samuel Housley*, the two other Relators herein named.”

“That the said indenture was devised and contrived fraudulently for the purpose and intent to delay, hinder, or defraud the creditors of the said Defendant *A. Annesley* of their just and lawful actions, suits, debts, and demands, and in particular to delay and defeat the debt of the said *Frederick Engler*, and his proceedings in or under the said outlawry.”

“That at and before the time of executing the said indenture, the said Defendant *A. Annesley* was residing at *Holyrood House* for the purpose of avoiding his creditors, or of preventing or delaying the proceedings against him, and he was in very embarrassed circumstances, and indebted in very large sums of money, which he was wholly unable to pay.”

Four other passages of about equal length with those above set forth, were the subjects of other exceptions, but were not particularly adverted to in the argument.

Mr. Wakefield and *Mr. Kenyon*, in support of the appeal.

The passage included in the first exception is impertinent, because it is not necessary that Relators should have an interest in the subject of the suit; *Redesd. Pl.* p. 99. With respect to the other passages, the allegations contained in them are wholly immaterial, except on the assumption that the claim made by the information

ation is made on behalf of creditors, whereas it is the claim of the Crown alone: whatever interest creditors may have in its enforcement is not a matter of right, but of mere grace and favour on the part of the Crown; ——— v. *Bromley* (a), *Cuddon v. Hubert*. (b) All that the Attorney-General has to prove is, that the proceedings in the outlawry were regular, and that the deed was a fraud upon the rights of the Crown. But the stat. 13 *Eliz. c. 5.*, from which the language of these passages is evidently borrowed, will not help him in that, for the conveyances affected by that statute are made void as against creditors only, not as against the Crown. And it has been decided, that an alienation before inquisition, though after outlawry, will bar the right of the Crown; *Britton v. Cole*. (c) The statement contained in the third passage is also irrelevant; for if, by reason of the Defendant being at *Holyrood* or elsewhere out of the jurisdiction, the outlawry was bad, the circumstance of his being there for the purpose of avoiding his creditors, would not make it good; *Hesse v. Wood*. (d) If the information had prayed such relief as would alone have made these statements material, it ought to have been an information and bill: but then it would have been multifarious. The object of the draftsman has been to obtain indirectly the benefit of such a course without exposing himself to the objection to which it would have been liable. The Defendant ought not to be embarrassed in his defence by any such artifice.

1844.
The
ATTORNEY-
GENERAL
v.
RICKARDS.

Mr. *Campbell*, in the absence of Mr. *Russell*, *contrâ*.

Mr. *Wakefield*, in reply.

The

(a) 2 *P. Wms.* 269.

(c) 1 *Salk.* 395.

(b) 7 *Sim.* 485.

(d) 4 *Taunt.* 691.

1844.

The LORD CHANCELLOR.

The
ATTORNEY-
GENERAL
v.
RICKARDS.

It strikes me that these passages are, at most, nothing more than what would, in pleadings at common law, be called surplusage.

As to the first, it may be unnecessary, but I think it is not so immaterial as to justify me in pronouncing it impertinent: it may have been introduced for the purpose of shewing the Attorney-General that the relators had something to do with the suit, and that he might safely sanction it.

As to the second; there is no doubt that the interest of a creditor in the property of an outlaw is derived entirely from the courtesy of the Crown, and is not matter of right: but if it is the universal practice for the Crown to indemnify the creditor out of the proceeds of the outlawry, is it irrelevant to say that the deed was executed for the purpose of depriving the creditor of the benefit of the outlawry? The immediate object of the deed, no doubt, was to defeat the right of the Crown; but if the motive for the act was to prejudice the interest of the creditor, it surely is not immaterial to allege that. Where a party is charged with fraud, it is always a material question to ask what motive he could have had for doing the act; and the motive would be left to the jury. Suppose that, on a question as to the validity of this deed, a witness should prove a conversation with the outlaw, in which the latter said that he executed the deed to defeat the proceedings under the outlawry, and to deprive the creditor of the benefit of them; would not that be material evidence?

Then, as to the other passage, I do not think it is immaterial to the validity of the deed, that the party
was

was, at the time when he executed it, secreting himself in *Holyrood House*.

1844.
The
ATTORNEY-
GENERAL
v.
RICKARDS.

This is my present opinion upon these passages; but I will look through the information, and consider the other exceptions, before I dispose of the case.

On the following day, his Lordship said :

I adhere to the opinion I gave yesterday as to the three principal exceptions. I have looked through the others, and I think they resolve themselves into the first. As to that, the relators have introduced three lines, — only three lines — stating how they are concerned in interest. *Non ego paucis offendar maculis.*

None of the passages would, at common law, be considered as any thing more than mere surplusage. You sometimes get an order there to strike out an unnecessary count; but a few words more or less in a declaration would not be a ground for a reference to the Master to strike them out. I think, therefore, the order of the Master of the Rolls was right.

Mr. *Wakefield* submitted that, as the Master had allowed the exceptions, there ought to be no costs of the appeal.

The LORD CHANCELLOR thought that reasonable, and dismissed the appeal without costs.

1844.



Feb. 23.

COOPER v. EMERY.

The period for which a good title is required to be shown is still sixty years, notwithstanding the stat. 3 & 4 W. 4. c. 27.

The right of a purchaser to a covenant for the production of documents constituting part of his title, does not extend to copies of Court Rolls or indentures of bargain and sale enrolled, unless they are in the possession or power of the vendor.

A purchaser is not entitled as a matter of course to a covenant for the production of all documents contained in the abstract of title, which are not delivered to him, but only of those which are necessary to make out a good sixty years' title.

THIS was a suit, by a vendor against a purchaser, for specific performance of a contract for the sale of a small portion of an estate formerly copyhold, but which had been enfranchised in the year 1799.

Two abstracts had been delivered; one relating to the copyhold title, and commencing with a surrender dated the 8th of *May* 1736, the other relating to the title of the lord of the manor, and commencing with a settlement dated the 20th of *March* 1736.

Under a reference to the Master to inquire whether the purchaser was entitled to any and what covenants, to produce any and which of the documents contained in these abstracts, the Master reported that he was entitled to a covenant for the production of one only. To that report the purchaser filed an exception, insisting that he was entitled to a covenant for the production of all the documents except a few of recent date, which, as they related exclusively to the piece of land in question, were to be delivered to him. Amongst the documents specified in the exception were several copies of the Court Rolls and indentures of bargain and sale enrolled. The Vice-Chancellor allowed the exception, observing that, according to the practice of conveyancers the purchaser was entitled to a covenant for the production of all the documents that were found in the abstract, on the ground that the vendor, by abstracting them, had shewn that he considered them necessary to make out a good title. (a)

The

(a) See 10 *Sim.* 609.

The Plaintiff appealed from that decision.

The questions raised by the appeal were

First, whether the effect of the stat. 3 & 4 *W. 4. c. 27.* had been to shorten the period for which a good title was required to be shewn.

Secondly, whether the purchaser was entitled to the production of such of the documents mentioned in the abstract, as were copies of the Court Rolls, or indentures of bargain and sale enrolled.

Mr. Bethell and *Mr. Stratton* for the Appellant.

Mr. Walker and *Mr. Hopper* for the Respondent.

The LORD CHANCELLOR.

Feb. 2 .

Several points, and points of importance, were argued upon this appeal. The first, and the most important, was the effect of the statute of 3 & 4 *W. 4.* as to the period to which a good title should extend since the passing of that act. It was supposed that, by the operation of that act, it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but, after considering it, I am of opinion, that the statute does not introduce any new rule in this respect; and that to introduce any new rule shortening the period would affect the security of titles. One ground of the rule was the duration of human life; and that is not affected by the statute. It is true that, in other respects, the security of a sixty years' title is better

1844.

COOPER

v.

EMERY.

1844.

COOPER

v.

EMERY.

better now than it was before. But I think that is not a sufficient reason for shortening the period—for adopting forty years, or, as it has been suggested by a high authority, fifty years instead of the sixty. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration.

Another question is, whether the purchaser is entitled in this case to a covenant for the production of copies of the Court Rolls. If the vendor has these copies, or if they are in his power, he is bound to produce them; but if not, I think the purchaser is not entitled to call for a covenant to produce them; because he may at any time resort to the Rolls themselves and make use of them in evidence. I think that is quite sufficient, and I believe that is also the opinion of the most eminent and experienced conveyancers.

Then with respect to the indenture of bargain and sale, if it be a bargain and sale within the statute 10 *Ann. c. 18.*, it falls within the same principle as the copies of Court Rolls, because the purchaser may always have access to the enrolment, and by the statute the copy of the enrolment is made evidence.

I do not think, (and I say this with great deference, from the experience, in this branch of learning, of the Vice-Chancellor), I do not think that merely because an instrument is stated in the abstract of title, it therefore follows that the purchaser is entitled, as a matter of course, to a covenant to produce it. Such a rule would be injurious to purchasers themselves: for it would induce parties to withhold all information, but what they were strictly bound to give.

The result therefore is, that the purchaser is entitled to a covenant for the production of all the documents
contained

contained in the abstract, which are necessary to make out a good sixty years' title, except such as being copies of Court Rolls, or indentures of bargain and sale enrolled within the statute of *Anne*, are not in the possession or power of the vendor.

1844.

COOPER
v.
EMERY.

SMITH v. HENLEY.

March 8, 9.
14.

THIS was a suit for the specific performance of an agreement alleged to have been made between the Plaintiff and a Mr. *Warren*, as agent of one *Ede* deceased, for a lease to the Plaintiff of a dwelling-house and premises formerly the property of *Ede*, and which now belonged to the Defendants, as his devisees.

A court of equity cannot, any more than a court of law, receive parol evidence of the contents of a written agreement, which appears never to have been stamped, even where it is proved to have been fraudulently destroyed by the party against whom it is sought to be enforced.

The bill stated that in consequence of an advertisement which had appeared, announcing that the premises were to be let at a rent of 80*l.*, with a reference for further particulars to Mr. *Warren*, the Plaintiff in the month of *February* 1838, applied to Mr. *Warren* on the subject, and eventually agreed with him as the agent of *Ede*, to take a lease of the premises for twenty-one years, determinable at the expiration of the first seven or fourteen years of the term, at the yearly rent of 80*l.*, and that an agreement in writing bearing date in or about *April* 1838, was thereupon made and signed between and by *Warren* as the agent of *Ede* and the Plaintiff, whereby *Warren* as such agent, agreed to grant, and the Plaintiff agreed to take a lease of the premises for twenty-one years, commencing from the 25th of *March* 1838, determinable at the expiration of the

1844.

SMITH

v.

HENLEY.

the first seven or fourteen years of the term, upon notice as therein mentioned, at the yearly rent of 80*l.* payable quarterly. And it was thereby agreed, that all taxes payable in respect of the premises should be allowed by *Ede* up to the commencement of the tenancy, and that the Plaintiff should have immediate possession thereof, and that a lease should, without delay on the part of *Ede*, be duly prepared and executed.

The bill then stated, that in pursuance of the agreement, and shortly after the date thereof, the Plaintiff was let into possession of the premises, and that he expended a considerable sum in necessary repairs upon the faith of an agreement between himself and *Ede*, that he should be allowed such expenses out of the rent ; but that upon his applying to *Ede* shortly after completion of the repairs, to execute a lease to him in conformity with the agreement, *Ede* not only refused to do so, but, having obtained from *Warren* the possession of the memorandum, refused to deliver the same to the Plaintiff, or to give him any counterpart thereof.

The Defendants by their answer said, they had been informed and believed, and therefore admitted that the Plaintiff did agree with Mr. *Warren* as the agent of *Ede* to take a lease of the premises for the term of twenty-one years determinable as in the bill mentioned, and that *Warren* did as such agent agree to grant a lease accordingly, and that an agreement in writing for such lease was executed by *Warren* as such agent, and by the Plaintiff; but at what time it was executed, or what were the particular terms and conditions of it, they did not know. However, they said, they believed it was not stamped as by law required.

Mr. *Warren*, who was examined on the part of the Plaintiff, stated in his evidence that in the beginning of
the

the year 1838 he was employed by *Ede* to let the premises in question, and that on the 10th of *February* he agreed to let them to the Plaintiff, if the references given by him were satisfactory; and that it being found on enquiry that such references were satisfactory, the memorandum of agreement was drawn up by him, and reduced into writing, whereby it was agreed to let the premises on lease for seven, fourteen, or twenty-one years to the Plaintiff at the rent of 80*l.* a year, but whether the agreement was signed by the deponent on behalf of *Ede*, and also by the Plaintiff, he could not with certainty depose, although he had a faint idea that it was signed by himself and also by the Plaintiff.

1844.
SMITH
v.
HENLEY.

Mr. *Farnell*, who had acted in the transaction as solicitor for *Ede*, and who was also examined on the part of the Plaintiff, stated that an agreement in the handwriting of Mr. *Warren*, and signed by him as the agent of *Ede*, and also by the Plaintiff, was brought to him in or about the month of *April* 1838 by *Ede*, with instructions to prepare the necessary lease to the Plaintiff; that the said agreement was to the best of his recollection in conformity with some printed bills distributed by *Warren*, but that he was unable to state more particularly the purport of it. That it remained in his (the deponent's) possession for three or four months, when *Ede* requested to have it back to shew to Mr. *Warren*, and that the deponent accordingly gave it back to *Ede*, who then stated that he had taken a great dislike to the Plaintiff, and that he would, if he could, prevent him from having a lease of the premises. That in consequence of a subsequent application from the Plaintiff to proceed with the preparation of the lease, the deponent applied to *Ede* for the agreement, to enable him to prepare the lease, when *Ede* stated that he had not got it, that he knew nothing about it, nor would such agree-
ment

1844.

SMITH

v.

HENLEY.

ment ever be seen again; and, in fact, he intimated that the agreement was destroyed.

The same witness, on his cross-examination, stated, that when he returned the memorandum to *Ede*, it was not stamped.

The cause now came on to be reheard before the Lord Chancellor, upon the appeal of the Plaintiff from a decree of the Master of the Rolls, by which an issue was directed to try whether an agreement in the terms stated in the bill had ever been signed in or about the month of *April* 1838 by the Plaintiff and *Warren* as the agent of *Ede*; with liberty to the Judge to endorse any special matter on the *postea*.

Mr. *K. Parker* and Mr. *Bacon*, for the Plaintiff, having read the evidence of *Farnell*, for the purpose of tracing the memorandum of agreement into the hands of *Ede*, were proceeding to read parol evidence of its tenor, when

Mr. *Wakefield* and Mr. *Bacon*, for the Defendants, objected that such evidence could not be received, as it was proved that the written agreement had never been stamped, citing *Rippiner v. Wright* (a), in which it was held that where an agreement on unstamped paper had been destroyed, no parol evidence could be given of its contents, even though it had been destroyed by the wrongful act of the party taking the objection, the Court there observing "that it was the duty of the parties to an agreement to take care that when it was executed it was properly stamped, and that it was one of the risks attendant upon an omission to do this, that if any accident

(a) 2 B. & Ald. 478.

cident happened to the agreement before the stamp was affixed, there was no remedy upon it whatsoever."

1844.

SMITH

v.

HENLEY.

On the other hand, the counsel for the Plaintiff cited *Bousfield v. Godfrey* (a), where, it appearing that the Defendant, who had lost or destroyed the original agreement, had a copy of it in his possession, the Court ordered him to produce the copy for the purpose of being stamped, and directed that if the Plaintiff could produce the copy duly stamped at the trial, the Defendant should be precluded from setting up the original.

The LORD CHANCELLOR.

If there was in this case a copy of the agreement, or if your witness could verify from recollection the precise terms of the agreement on which you rely, so that you might take them down in writing, and produce that writing at the Stamp Office, I should be very glad to act upon the authority of that case ; but it does not appear that any body has a copy, and your witnesses state only the general tenor of the agreement, and not the contents of it.

For the Plaintiff.

In *Hart v. Hart* (b) the Vice-Chancellor held that the *onus* lay upon the party taking the objection, to prove that the instrument was not stamped at the time when secondary evidence was offered : and here all that is proved is, that the instrument was not stamped when it was taken out of the possession of *Farnell* : it may have been stamped since.

The

(a) 5 Bing. 418.

(b) 1 Harc. 1.

1844.

SMITH

v.

HENLEY.

The LORD CHANCELLOR.

No doubt, the *onus* lies in the first instance upon the party taking the objection; and the Court will require strict proof of the fact before it will allow the objection; but this, like all other conclusions of fact, is a matter of inference from the circumstances which are proved. Now here it is proved that this agreement was not stamped when Mr. *Ede* took it away from Mr. *Farnell*; and it cannot be supposed that Mr. *Ede* would afterwards have paid a penalty for the purpose of having an instrument stamped, which he wanted to get rid of. I am therefore compelled to come to the conclusion that the instrument never was stamped.

For the Plaintiff.

A court of equity will go further than a court of law in admitting secondary evidence of an instrument, the original of which is not to be found; more particularly where the original has been destroyed by the party who would have been bound by it; *Cookes v. Hellier* (a), *Whitfield v. Fausset* (b), *Cole v. Gibson*. (c) The Ship Registry Act and the Statute of Frauds are both, like the Stamp Act, founded on public policy, and yet in a case of fraud this Court will give relief against the express words of those statutes; *Mestaer v. Gillespie*. (d)

The LORD CHANCELLOR.

This is quite a different question. The Stamp Act was passed for the protection of the revenue, and it expressly provides that the instrument shall not be proved in evidence unless properly stamped. I have no power,
under

(a) 1 *Ves.* sen. 234.(b) *Ibid.* 387.(c) *Ibid.* 503.(d) 11 *Ves.* 621. See p. 626.

under any circumstances, to dispense with that condition.

1844.

SMITH

v.
HENLEY.

The Plaintiff's counsel then insisted, that as the bill stated a parol agreement as well as a written one, and as the former was admitted by the answer, which did not set up the Statute of Frauds, that admission was sufficient to entitle them to a decree; *Huddleston v. Briscoe* (a); but

The LORD CHANCELLOR said; What is relied on as a parol agreement is mere treaty; where a parol agreement is followed by one in writing, the latter supersedes the former, and constitutes the only agreement between the parties.

On the conclusion of the argument, his Lordship, after briefly recapitulating the several answers that had been attempted to be given to the objection, said that he adhered to his opinion, that the objection was insuperable; and as the Plaintiff had failed to prove that which was the foundation of his case, the bill must be dismissed.

Mr. Wakefield then asked for the costs of the suit as well as of the appeal, insisting that he was entitled to the former upon the merits, as he was prepared to shew from the evidence: and that as the appellant had failed in his appeal, he was entitled to the costs of that also, by the ordinary rule.

The LORD CHANCELLOR.

The case has been decided upon the objection for want of a stamp. If, instead of insisting upon that objection, you had allowed the merits to be gone into, you might

(a) 11 *Ves.* 583.

1842.

SMITH

v.

HENLEY.

might perhaps have satisfied me that you were entitled to have the bill dismissed with costs : but having chosen to ask for the decision of the Court upon a point which is wholly independent of the merits, it cannot be right that you should open the whole case now on the question of costs. I never heard that, after the case was disposed of, a party had a right to go into all the evidence, read and unread, upon the question of costs : and in this case, no evidence at all, relating to the merits, has been read. Considering, therefore, the point on which the decision proceeds, and which is all that I know of the case, I think the bill should be dismissed without costs. And as to the costs of the appeal there can be no question, for I have varied the decree below. Therefore both the appeal and the bill must be dismissed without costs.

1844.

March 1. 14.
15.

FOLEY v. HILL and Others.

THE Defendants in the year 1829 carried on the business of bankers at *Stourbridge*, under the firm of *Hill* and Co. In the year 1834, the Defendant, *Hill*, retired from the business, which was thenceforth carried on by the other two Defendants under the firm of *Bate* and *Robins*.

The bill, which was filed on the 27th of *January* 1838, stated that, in the month of *April* 1829, the Plaintiff opened an account with Messrs. *Hill* and Co., and on the same day paid the sum of 6117*l.* 10*s.* into the bank, for which they sent him a receipt inclosed in a letter, in which they agreed to allow him interest at 3 per cent. per annum upon the balances from time to time in their hands. That at the time when that account was opened the Plaintiff and one Sir *Edward Scott*, who was his partner in working some collieries, kept a joint account at the same bank, which account was distinct from the Plaintiff's private account, and related exclusively to the transactions of the colliery; and that between the month of *April* 1829 and the month of *August* 1834, when the joint account was closed, the agent of the collieries drew cheques half yearly against the joint account in favour of the Plaintiff in respect of his share of the profits of the colliery; and that the amounts of such cheques were,

In the case of a legal demand, a Court of Equity acts in obedience, and not merely by analogy, to the Statute of Limitations.

A banking firm, who, on opening an account with a customer, had agreed to allow him interest at 3 per cent. on the balances which should from time to time be standing to his credit, set up the Statute of Limitations as a defence to a bill filed against them, by the customer, for an account. The account, as it stood in the bankers' book, showed a considerable balance due to the Plaintiff, but there being no item

in it, or evidence of any transaction connected with it, of a date within six years prior to the filing of the bill, nor any suggestion in the bill, that the bankers were bound, by the agreement or otherwise, to have actually entered the interest as it became due to the credit of the customer in the account, or that they had omitted so to do with a fraudulent intent, the defence was allowed to prevail.

An account between a banker and his customer, consisting of three items only and interest, held not to be a proper subject for a bill in equity.

1844.


Foley
v.
Hill.

were, on those occasions, carried to the credit of the Plaintiff's private account. The bill further stated that during the same period Messrs. *Hill* and Co. paid various sums on account of the Plaintiff, which were placed to the debit of his private account; and that they had, in pursuance of their agreement, from time to time entered in their books, to the credit of the plaintiff on his private account interest, at 3 per cent. upon the balance from time to time due to him. The bill then charged that the private account was still open and unsettled, and that it consisted of numerous items on each side, and could not be fairly adjusted except under the decree of a court of equity; and, after suggesting that the Defendants intended to rely on the Statute of Limitations, it contained various charges to the effect that the Defendants had, by correspondence between themselves and otherwise, recognised the private account as an open account, and the balance due thereon to the Plaintiff as a subsisting debt; but it contained no express charge that it was the duty of the bankers under the agreement to have regularly entered interest to the credit of the private account, or that if they had omitted to do so, it was with a fraudulent intent.

The Defendants by their answer admitted the agreement to allow 3 per cent. on the balances from time to time in their hands on the Plaintiff's private account; but they stated (and so it appeared from their books) that the only items of which that account consisted were the original deposit of 6117*l.* 10*s.* on the credit side, and two sums of 1700*l.* and 2000*l.* on the debt side, both being payments made in the year 1830; and that, though previously to and down to the 25th of *December* 1831, interest at 3 per cent. on the balances from time to time due to the Plaintiff had been calculated and placed in the interest column of his private
account

account in their books ; the amount of such interest had never been actually entered to the credit of such account, and that since the 25th of *December* 1831 no interest had ever been even calculated.

1844.

FOLEY
v.
HILL.

With respect to the cheques drawn upon the joint account, and the amount of which were alleged by the bill to have been placed to the Plaintiff's credit in his private account, the Defendants, in a passage of their answer, which was read by the Plaintiff as evidence, stated that those cheques had always been paid to the agent who presented them, either in cash, or, when so required by him, by bills upon the *London* correspondents of the bank, payable to the Plaintiff or to his *London* banker's, and that the amounts of such cheques were placed to the debit of the joint account ; but that none of them had ever been entered in the private account, such transactions being, as the Defendants insisted, distinct and independent transactions, having no connection with the private account.

The Defendants admitted that the private account had never been balanced or settled with the Plaintiff ; but they submitted whether, under the circumstances above stated, such account still remained open and unsettled, and they claimed the benefit of the stat. 21 *Jac.* 1. c. 16., insisting that they had never, within six years before the filing of the bill, promised to pay the Plaintiff balance of such account, or to come to any account with him in respect thereof.

The only evidence adduced on the part of the Plaintiff of an express acknowledgment by the Defendants of the subsistence of the private account within the six years, consisted of two letters, written by one of the Defendants to another, but which the Lord Chancellor, as

D d 4

will

1844.

FOLLEY

v.

HILL.

will be seen from his judgment, did not consider to amount to such acknowledgment.

On the hearing of the cause before the Vice-Chancellor of *England*, his Honor made the usual decree for an account, from which decree the Defendants appealed.

The appeal now coming on to be heard,

Mr. *Stuart* and Mr. *G. Russell*, for the Plaintiff, argued that the relation between a banker and his customer was not simply that of debtor and creditor, but a confidential relation, which imposed on the former an obligation to keep the account according to the agreement made between the parties when the account was opened; and that the Defendants being in this case under an express engagement to allow interest at 3 per cent. on the balances from time to time in their hands, it was their duty to have entered such interest regularly to the credit of the Plaintiff's account, which would have ousted the plea of the statute; and that to allow them, under such circumstances, to avail themselves of the statutes, would be to enable them to take advantage of their own wrong. That, they said, was the ground on which the Vice-Chancellor had expressly rested his decision; and they relied on the doctrine laid down by Sir *Anthony Hart* in *Sterndale v. Hankinson* (a), "that pleas of the statute were allowed in Courts of Equity by analogy only, and to prevent stale demands; and that where the circumstances of a case were such as to make it against conscience to apply the rule founded on that analogy, the Court would not enforce it."

Independently,

(a) 1 *Sim.* 395. See p. 398.

Independently, however, of this point, they contended that the bill transactions which had arisen out of some of the cheques drawn in favour of the Plaintiff against the joint account, and several of which were admitted to have taken place within the six years, were private dealings between the Plaintiff and the bank, and ought to have been entered as such in his private account.

1844.

FOLEY
v.
HILL.

Mr. *Bethell* and Mr. *K. Parker*, for the Defendants, as to the relation between a banker and his customer, cited *Devaynes v. Noble* (a); and, as to pleas of the statute in Courts of Equity, *Hovenden v. Lord Annesley* (b); and they insisted that, after leaving out of the case the transactions connected with the joint account, which they contended were wholly independent of the private account, the latter was no longer a proper subject for a suit in equity; as all that was required was a computation of what was due for principal and interest on the sum of 6117*l.* 10*s.*, after deducting the two sums of 1700*l.* and 2000*l.*, *Dinwiddie v. Bailey* (c); *King v. Rossett*. (d)

Mr. *Stuart*, in reply.

The LORD CHANCELLOR.

The Defendants in this case carried on the business of bankers at *Stourbridge*, under the firm of *Hill* and Co. The Plaintiff *Foley* deposited with them, in the year 1829, the sum of 6117*l.* 10*s.*, and received from them

(a) 1 *Meri.* 530. See p. 568.

(c) 6 *Ves.* 136.

(b) 2 *Sch. & Lef.* 607. See p. 630.

(d) 2 *Y. & J.* 33.

1844.

FOLLEY

v.

HILL.

March 15.

them the usual receipt; and, in a note inclosing the receipt, they engaged to allow him 3 per cent. interest on the balances, which should from time exist in his favour on the account. *Folley* subsequently drew two cheques, at different times, for 1700*l.* and 2000*l.* upon this account. The latter of these cheques was drawn in *July* 1830. The Defendants entered these payments, according to the usual custom, in a ledger, and also calculated interest on the balances up to *December* 1831. From that time there has been no payment in respect of the account; no entry in the books, no acknowledgment of debt. The Defendants, under these circumstances, set up the Statute of Limitations. And the question is, whether that is a valid defence to the suit.

It is quite clear, that a banker is not to be considered a trustee for his customer in the legal sense of the term. Money advanced by a customer to a banker is a loan, and constitutes a debt. If it were necessary to refer to authorities in support of this proposition, I might refer to *Sims v. Bond* (a), in the Queen's Bench, where it was laid down, that sums paid to the credit of a customer with his banker, though usually called deposits, are in truth loans to the banker. And that is in accordance with the doctrine of Sir *W. Grant* in *Devaynes v. Noble*. He says, "There is a fallacy in likening the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance: money paid into a banker's, becomes immediately a part of his general assets; and he is merely a debtor for the amount." And he lays down the same doctrine in *Carr v. Carr*. (b) Here, there was a loan by *Folley* to the defendants, to be repaid with interest at 3 per cent.: that was the simple transaction between them,

(a) 5 B. & Ad. 389.

(b) 1 Meri. 541. n.

them, and if this were a case at law, a plea of the Statute would be a sufficient answer, unless there were some special circumstances to take the case out of the Statute; and the only question therefore is, whether that defence is to have the same effect in a court of equity.

1844.
FOLLY
v.
HILL.

Now, the doctrine on that point is clearly and satisfactorily stated by Lord *Redesdale* in the case, referred to at the bar, of *Hovenden v. Lord Annesley* (a). He says, “It is a mistake in point of language to say, that Courts of Equity act merely by analogy to the statute; they act in obedience to it—that is, as he afterwards explains himself, “upon all legal titles and legal demands”—(and this, it will be observed, is a legal demand). “I think,” he adds, “the statute must be taken virtually to include courts of equity: for when the legislature, by statute, limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law; and, therefore, it must be taken to have virtually enacted in the same cases a limitation for courts of equity also.” If, therefore, the Statute would in this case be a good defence at law (I am now on the general question without reference to any specialty), it constitutes a sufficient answer here: and the only remaining question is, whether there are any special circumstances to take the present case out of the statute.

[His Lordship then adverted to the letters above referred to, and to the transactions connected with the joint or colliery account; and, after stating his opinion, that neither the one nor the other amounted to an acknowledgment

(a) *Ubi sup.*

1844.

FOLEY

v.

HILL.

acknowledgment that the debt was due or the account open, he proceeded as follows:—]

It is further said, however, that it was the duty of the Defendants, as bankers, or by reason of the mode in which they usually conducted their business, to have entered the interest half-yearly in their books, on the balance remaining due; that if such entries had been regularly made, the case would have been taken out of the statute; and that, having neglected to do this, they ought not to be allowed to profit from their neglect by setting up the Statute of Limitations as a defence founded on their own omission. But no such question is raised by the bill; no such equity is insisted upon or suggested. The bill is confined entirely to the statement of subsequent transactions for the purpose of taking the case out of the statute.

But, assuming it to have been the duty of the bankers to keep the account between them and the Plaintiff, and that the neglect of this duty had been made matter of complaint in the bill, what is there to shew that it was their duty to keep the account in any particular form? In the account produced, the interest is calculated upon the balance of the principal money due after the last payment, and for a year from that time. The balance remaining afterwards unchanged, the subsequent interest would be a matter of easy calculation whenever it might be necessary to make it for any purpose.

If it is meant to be said, that the Defendants ceased to enter the interest for a fraudulent purpose, that should have been made matter of charge in the Plaintiff's bill; but there is no such suggestion, the only facts relied upon to meet the defence on the statute being,

being, as I have already stated, the subsequent transactions between the parties.

1844.

FOLRY

v.

HILL.

I think, therefore, the Statute of Limitations is a sufficient defence, as the record is at present constituted.

But there is another point which is of great importance to the practice of the Court. This bill is filed for an account: that is the sole object of it. Now the account consists of three items only; one on one side and two on the other. I am of opinion that such an account as that is not a proper subject for a bill in this Court: it is a case for an action for money had and received. A party has no right to come here upon a simple transaction of this kind, when justice may be administered in a more simple way and at less expense in a court of law. When this objection was made before the Vice-Chancellor, he stated that two actions would have been necessary in a court of law, because one partner had left the firm; but that was a misapprehension: for it appears that *Hill* was a partner up to the date of the last transaction; and if that fact had been present to the mind of the Vice-Chancellor, he would probably, on principle, have come to the same conclusion upon the last point that I have.

The bill, therefore, ought to be dismissed, and, on the last ground, with costs.

1842.

1842.
Nov. 21, 22.

Dec. 5.

1844.

Jan. 29.

Proof of perception of certain tithes by the successive officiating curates of a church for a period of nearly 200 years, without opposition on the part of the inappropriate rectors, who had during the whole of that time resided in the parish; held sufficient evidence of title, as against the tithe-payers, to support a bill for such tithes by the present minister as perpetual curate, although the defendants insisted that such perception had been permissive only, and the documentary evidence was irreconcilable with the supposition of an endowment.

To a bill by a perpetual curate for tithes, a *modus* was held to be well pleaded, as "payable to the inappropriate rector or other owner for the time being of the tithes."

The provisions of the 3 & 4 W. 4. c. 42. ss. 26, 27. for removing the incompetency of witnesses who would otherwise be incompetent by reason that the verdict or judgment in the pending action might be used as evidence for or against them in another proceeding, apply exclusively to courts of law, and have no application to courts of equity.

OLIVER v. LATHAM.

IN this case, (which is reported *supra*, p. 163., upon a point of evidence,) there was an appeal by the Plaintiff, and a cross appeal by the Defendants from the decree of Vice-Chancellor *Knight Bruce*, by which three issues were directed: the two first being, whether certain pieces of land, called respectively *Dustilow Dole* and *Priest's Meadow*, had immemorially been and ought of right to be held and enjoyed by the rector or curate of the parish of *Barlaston*, or other person for the time being entitled to the tithes of hay within the parish, in lieu and satisfaction of the tithe of hay within certain districts of the parish respectively; and the third being, whether a certain money payment had immemorially been paid and was of right payable to the rector, &c., [in the same terms] in lieu of the tithes of milk and calves within the parish. And it was further directed that it should be admitted before the jury that if the tithes in question were payable in kind, they were payable to the Plaintiff as curate of the parish. (a)

The Plaintiff, by his appeal, contended that, upon the evidence in the cause, he was entitled to an immediate decree for an account of all the tithes claimed by the bill, in kind. The Defendants, on the other hand,

by

(a) See 1 Y. & Coll. N. S. 243.

by their appeal, contended that the tithes and other property which the Plaintiff and his predecessors in the curacy had enjoyed, appeared from the evidence to have been so enjoyed by sufferance only of the impropriate rector and not as of right, and consequently that the bill ought to have been dismissed, or, at all events, that the Plaintiff's title as perpetual curate ought not to have been affirmed without an issue.

1842.

OLIVER
v.
LATHAM.

At the hearing of the appeals the counsel for the Plaintiff, in addition to the objection taken by them to the admissibility of the evidence of *John Aston* (as reported, *supra*, p. 163.) contended, as they had done in the Court below, that the moduses being laid in the alternative as payable to the "impropriate rector or other owner for the time being of the tithes," were not well pleaded, citing *The case de Modo decimandi*. (a) *Whieldon v. Harvey* (b), in answer to which, the counsel for the Defendants cited *Ord v. Clavering* (c), *Fane v. Maston* (d), *Davies v. Lord Bagot* (e), *Braithwaite v. Bosley* (g), *Payne v. Wood* (h).

The principal question, however, on the present occasion, related to the title of the Plaintiff to sustain the suit, as perpetual curate; it being contended on the part of the Defendants, that the documentary evidence (the particulars of which are fully detailed by the Lord Chancellor in his judgment), proved conclusively, that at the time of the dissolution of monasteries, there was no endowed vicarage in the parish, but that the whole of the property and profits of the rectory belonged *pleno jure* to the priory of *Trentham*, and consequently that the minister of the church must at that time

(a) 1 *E. & Y.* 183.; see p. 189.(e) 4 *Wood*, 294.(b) 2 *E. & Y.* 160.(g) *Ibid.* 338.(c) 2 *Wood*, 294.(h) *Ibid.* 561.(d) 1 *Wood*, 254.

1842.

OLIVER
v.
LATHAM.

time have been merely a stipendiary curate; that if he was then only a stipendiary curate, he must have continued so ever since: because a curate, whether called a perpetual curate or not, not being a corporation, could not, like a vicar, take an endowment to him and his successors, except under the 17 *Charles 2. c. 3. s. 7.* or the 1 *G. 1. c. 10. s. 4.*; and that in the present case no endowment could be presumed to have been made, under either of those statutes, prior to the year 1744, inasmuch as, for nearly a century before that time, the property of the impropriate rectory had constantly been in strict settlement, nor subsequently to that year, inasmuch as an endowment would then have required to be enrolled in Chancery, pursuant to the stat. 9 *Geo. 2. c. 36.*; and there was no such enrolment to be found. No endowment therefore could be presumed, but by presuming an express act of parliament, which the court would not do, *The Queen v. The Chapter of Exeter (a)*, particularly where the enjoyment of the tithes might be explained, as in this instance, by supposing it to have been permissive. On that supposition, however, the bill could not be maintained, inasmuch as a curate could not prescribe for tithes, *Bott v. Brabalon (b)*, *Birch v. Wood (c)*, *Pawly v. Wiseman (d)*, and a title to tithes resting upon a mere parol grant was not sufficient to sustain a suit, *Jackson v. Benson (e)*, *Williams v. Jones (g)*, *Robinson v. Williamson (h)*.

Mr. Spence and Mr. Eagle, appeared for the Plaintiff.

Mr. Boteler, Mr. Simpkinson, Mr. Lowndes, Mr. E. F. Smith, and Mr. Loch, for the Defendants.

The

(a) 12 *Ad. & Ell.* 512.

(b) 1 *E. & Y.* 160.

(c) 2 *Salk.* 506.

(d) 3 *Kebbl.* 614.

(e) *McClel.* 62.

(g) *Young*, 252.

(h) 9 *Price*, 136.

1844.

OLIVER

v.

LATHAM.

emoluments belonging to the said church, with the house called the priest's house, and the lands thereto belonging, after the same form that *James Asten* had." And it contains a stipulation, that the lessee should serve the cure himself, or find a lawful curate to discharge the prior and convent, and their successors.

The inference drawn from that document is, that at the time of the dissolution of monasteries, there was no endowed vicar or curate in this parish, but that the priory held the church, and the property belonging to it, in full right.

It then appears that, immediately after the dissolution, *Henry VIII.* conveyed the property of the priory to the Duke of *Suffolk*, by whom it was conveyed very shortly afterwards to a person of the name of *Thomas Pope* and his wife; and that, very soon afterwards, *Thomas Pope* and his wife conveyed it to *James Leveson*, in whose family it has remained ever since. Among the documents that are referred to, there are the accounts of one *John Terrick*, the bailiff of the *Leveson* family. In the year 1606 he accounts, under the head of the vicarage of *Barlaston*, for 40s. which is supposed to be the rent reserved by the lease to which I have referred: but it is not probable, from the interval of time, that it was the same lease: that lease must have expired: but as it was granted in correspondence with a previous lease to a person of the name of *Asten*, it is not improbable that, after the expiration of the lease to *James Hordron*, the owner of the rectory should have granted a similar lease to some other person. In the year 1609 the bailiff renders a similar account: and there is every reason, therefore, to infer that no change had taken place in the nature of this property down to the year 1609. Then it appears that, in the year 1655, the bailiff accounts, under the head of *Barlaston*, for the

rent

rent of the mansion and the lands adjoining and of several of those portions of land which now constitute the glebe ; from which it would appear that the lease had run out, and that the property was, at that time, in the hands of the rector, that is, of the *Leveson* family.

1844.
OLIVER
v.
LATHAM.

Then in the year 1660, it appears that Sir *Richard Leveson*, in whom the property was then vested, devised it in strict settlement, and died in the following year 1661; and, though the property seems to have been afterwards resettled, it was admitted at the bar by the counsel for the Plaintiff that it was so fettered, up to the year 1744, as to prevent any change whatever in its condition. So that if this rectory was the property of the *Levesons*, in the year 1660, it must have continued to be their property unaltered up to the year 1744.

It is true, that, from the year 1744 down to the present time, alterations might have taken place. But the claim made by the perpetual curate is a claim of this description, that the title, from the year 1744 to the present time, is a mere continuation of his former title; and there is no suggestion, and no evidence to shew, that any alteration has since taken place.

If therefore no curate, no perpetual curate, or vicar having a right to these tithes, to this mansion and glebe, existed at the time of the dissolution of the monasteries, this evidence is strong to shew that the enjoyment of them subsequently to that period by the curate must have been, not an enjoyment in right, but an enjoyment by permission of those who were entitled to the property of the rectory, that is, the *Leveson* family: and certain passages, I think, in three of the terriers are referred to, which I shall by and by advert to, in confirmation of this position.

1844.


 OLIVER
v.
LATHAM.

It was supposed that it might be suggested on the other hand, that a grant might have been made under the statute of the 17 *Charles 2. c. 13.*; but that suggestion was anticipated by the counsel for the Defendants by saying that that was impossible, because that Act did not pass till the year 1655, at which time the property was in strict settlement. There was no power therefore to make any such grant; and though it was liberated from those fetters in the year 1744, yet after 1744 no grant could have been made without an enrolment under the Statute of Mortmain: no enrolment however has been produced, and there is no ground whatever for believing that any enrolment was ever made. That is the substance of the case on the part of the Defendants.

On the other side this case is set up as inconsistent with the case on the part of the Defendants — as they say, utterly inconsistent with it.

The first terrier that is referred to, is dated in the year 1616, and is entitled “Terrier of the vicarage and all the glebe lands, &c. of *Barlaston*.” In that terrier the house is mentioned, and the parcels of the glebe lands belonging to the vicarage; and, when it comes to the head of tithes, it says, “All tithes usual and accustomed within the parish.” That, therefore, is a claim of right in the supposed vicar at that time to the house, the glebe lands, and certain tithes: the particular tithes are not enumerated. There are four other terriers going down to the year 1693, which are confined merely to the glebe lands and house, and in all of which this curacy, as it is now called, is denominated a vicarage; but no mention is made in any of those terriers of tithes, except in that of the year 1676, and then by mere allusion, in speaking of Priest’s meadow, which, it says, “freeth twelve wares of land in the parish from paying tithe hay.”

hay." The other three terriers merely enumerate the house and glebe lands, and state nothing more. All the terriers are signed by the churchwardens. The two first are also signed by the minister of the parish, who describes himself not as vicar, but as minister; and the first is also signed by several of the parishioners.

1844.
OLIVER
v.
LATHAM.

It appears, therefore, that from the year 1616 down to the year 1693, there was a claim on the part of the minister, acquiesced in by the parish — a claim of right, to the house, the glebe lands, and, according to the two first terriers, to certain tithes, which is directly at variance, certainly, with the documentary evidence to which I have referred on the other side. I do not lay any stress, nor do I think much stress was laid at the bar, on the evidence, that the property mentioned in these terriers is described as the property of the vicarage; because, if it was an impropriation, the great tithes at all events were in lay hands, the cure was served by another person; and it was very easy for persons who were not conversant with the law, to have confounded a perpetual curacy or a curacy with a vicarage.

Then, in the year 1698 comes the first terrier which enters into detail with respect to the property. That terrier is entitled "A terrier of the glebe lands and tithes, building lands, tithe and other property belonging to the curate" — called curate here for the first time — "of *Barlaston* in the county of *Stafford*." After enumerating the property in the same way as the other terriers did, it goes into a very special enumeration of the tithes to which the curate is entitled. It is signed by the curate, by the churchwardens, and by a considerable number of the parishioners; and this enumeration of tithes includes the tithes which are claimed at the

1844.

OLIVER

v.

LATHAM.

present time : when I say it includes them, I say it generally : I am not going into detail at present. This was in the year 1698; from the year 1698 down to the present time there is a succession of terriers corresponding in substance with the terrier of 1698, stating the house, the lands adjoining, the glebe lands and tithes, which are there enumerated, as belonging to the church.

So that there is for a period of more than 200 years, an enjoyment of what is now claimed by the curate, under a claim of right : for those terriers are a constant and repeated claim of right, a claim of right acquiesced in during the whole of that period, not only by the parishioners, but also by those parties who are supposed to have been successively entitled to this property ; they never interfering for the purpose of making any claim themselves, although they must have been conversant with what was going on in the parish, being, during the whole of this period, entitled to the tithes of corn and grain, which they collected from time to time by their agent ; and the head of the family constantly residing in the immediate neighbourhood.

Now, I hardly know what can be sufficiently strong to be set in opposition to an uninterrupted enjoyment for so long a period, under a claim of right, submitted to and acquiesced in and acknowledged under their hands, by persons who might be interested to dispute it, and no counter claim whatever being made during the whole of that period by the only person who, if the present curate is not entitled to the property, would himself have been entitled to the enjoyment of it.

But I think this is not all ; for a circumstance has occurred in the history of this transaction, which it is
most

most material to advert to. In the year 1736, an application was made by Lord *Gower*, who was at that time tenant for life of the rectory, to the governors of Queen *Anne's* bounty, to make a grant to this curate; and the application was made on the ground that Lord *Gower* would himself contribute to the extent of 300*l.* and upwards, if the governors of Queen *Anne's* bounty would contribute to the amount of 200*l.* This was acceded to by the governors; they made this grant of 200*l.*, and in the grant they recite that Lord *Gower* had made the proposition to which I have referred, and that he also made a corresponding grant. It appears however that, in that respect, there is some mistake, because there is no proof of any such grant having been made by Lord *Gower*, though there actually was a grant made by the governors of Queen *Anne's* bounty at his solicitation. Now it can hardly be supposed that, at that time, this was a mere stipendiary curacy, depending entirely on the will and inclination of Lord *Gower*, because, in that case, the grant by the governors of Queen *Anne's* bounty would have been substantially a grant to Lord *Gower* himself. It must therefore have been understood by the parties at that time, by Lord *Gower* himself as owner of the rectory, that this was a curacy in some shape or other endowed.

On the other hand there is, as I have said, something in three of the terriers, which was relied on as confirming the notion that the enjoyment of this property by the curate had always been merely permissive. In those terriers, the first of which is dated I believe about the year 1701, after enumerating the property, this passage occurs: "All which aforesaid houses, lands, tithes, and dues belong to the incumbent, when he is nominated, and the properties are given to him by the patron of our church, who is the worshipful Sir *John Leveson Gower* of
E e 4
Trentham."

1844.

OLIVER

v.

LATHAM.

1844.

OLIVER

v.

LATHAM.

Trentham." From that passage it is inferred that there is, first, a nomination, and then a separate gift of these profits. If so, there would, in all probability, have been some instrument evidencing such gift; no such instrument, however, is proved to have ever existed. But I do not put that construction upon the passage; the true construction of it I think is, that the curate enjoys these profits upon the benefice being given to him, not that the party giving the benefice had any property in the tithes, &c. The passage, however, occurs only three times. All the other terriers merely mention that the nomination to this curacy is in some member of the *Leveson* family. I do not attach therefore much weight to this circumstance; it is a circumstance, but not sufficiently strong to lead me to alter my opinion with respect to the force and effect of the long and uninterrupted possession and enjoyment which the curate of this parish is proved to have had, and the continual admission of his right by those parties who alone were interested in contesting it. And I do not think that I should be doing right, if I were to hold that such enjoyment, acquiesced in and admitted for so long a period of time, is insufficient to establish the right for the purpose of this suit, merely because I cannot reconcile it (which I confess I cannot) with some of the ancient documents.

Before I proceed to enter into a detail of the evidence respecting the moduses, I will advert to an objection made in point of law as to the way in which they are laid; it is said they are badly laid, because they are laid in the alternative; now it is true that it will not do to say that a sum of money, payable by way of modus, is payable "to the vicar or curate," or "to the rector or vicar;" and for this obvious reason, that payment to the vicar cannot be a satisfaction for tithes due to the rector,

or

or *vice versa*. That is the principle, I believe, on which those decisions have proceeded; but it has always been considered, and must be considered, that a modus is well pleaded if alleged to be payable to the person entitled to the tithes for the time being: that has never been disputed. It is stated in Mr. *Eagle's* book (a), who argued in support of the objection, that it is sufficient to state a modus generally, without saying to whom it is payable, because it will be presumed to be payable to the person entitled to the tithe for the time being, and the case of *Busk v. Lewis* (b) is cited, for that opinion; but it is not necessary to go so far as that: it is sufficient to say, that it is good to lay the modus as payable to the person entitled to the tithes for the time being. There can be no objection to that in principle; and several cases were cited at the bar, among others the case of *Ord v. Clavering*, in confirmation of that position. That was an issue directed by the Court of Exchequer: the terms of the issue were, whether a certain sum was payable in lieu of certain tithes to the party entitled to the tithes for the time being. That is a decisive authority, to shew that it is sufficient to lay a modus as payable to the party entitled to the tithes for the time being; if so, it certainly cannot be wrong to say, that it is payable to the improper rector or other person entitled to the tithes for the time being; for that is precisely the same thing.

1844.

 OLIVER
 v.
 LATHAM.

[His Lordship then took a review of the evidence relating to the moduses, and, after expressing his opinion that the issues were rightly directed, proceeded as follows:]

A question arose in the course of the discussion which it is material I should advert to, because it is not only

(a) 2 *Eagle on Tithes*, 112.

(b) *Jac.* 363.

1844.

OLIVER
v.
LATHAM.

only of importance with reference to the trial of these issues, but generally. That question is, whether *John Aston* is a competent witness. It appears that he is an owner of property in the parish, and also in the district to which one of the district moduses applies: he is therefore interested in establishing both the parochial modus and that district modus. I conceive that he would not be a competent witness if it were not for the statute of the 3 & 4 W. 4. c. 42., nor was it, I think, very strenuously contended that he would; but I am of opinion that that statute does not at all apply to any proceedings in a Court of Equity.

I have read over and considered the twenty-sixth clause, and the terms are so precise and distinct as applicable to courts of law, and courts of law only, that I think it has no application whatever to Courts of Equity. The Vice-Chancellor of *England* came to a different conclusion in the case of *Wheat v. Graham* (a), but afterwards, in the case of *Hall v. Ellis* (b), he appears to have changed his opinion. The latter case, therefore, at least neutralises the authority of the former. But the point came before the Court of Exchequer in the case of *Barnes v. Stewart* (c); and, though Mr. Baron *Alderson*, who was then sitting, appeared to think there was some doubt on the subject, yet he inclined strongly to the opinion that the act of parliament did not apply to proceedings in a Court of Equity; and, on a subsequent occasion, on the trial of a modus, where the question was, whether an occupier or an owner could be admitted as a witness to prove the modus, the same judge expressed a decided opinion that he could not, and that the act of parliament did not apply. He did not, however, rely on his own judgment

(a) 7 Sim. 61.

(c) 1 Y. & Coll. 123.

(b) 9 Sim. 530.

1844.

OLIVER
v.
LATHAM.

ment only, but, according to the report, he consulted the other Judges of the Court, and they were all of opinion that the act of parliament did not apply to any proceeding in a Court of Equity. I take that to be a sound opinion, and on that authority, which coincides with my own view of the construction of the act, I think that Mr. *Aston* was not a competent witness, for the purpose of proving either the parochial modus, or the modus applicable to the district in which he is a landowner.

I have looked at this question with some anxiety, because it is a most important feature in this case; for I think there will be very great difficulty in establishing many parts of the case if *John Aston's* evidence is excluded. I am aware that another Act has been passed since, which would make him a competent witness (a); but there is a clause in it which excepts pending suits. I wish it therefore to be understood, that I have only spoken of him hitherto as a witness in the cause up to this point. It will be for the learned Judge who tries the issues to exercise his own judgment as to whether or not, upon the feigned issues directed by this Court, his evidence is admissible; subject, of course, to my review hereafter; but I think that I ought not in the first instance to state my opinion upon that point.

Upon the whole case, I think, for the reasons I have stated, that the judgment of the Vice-Chancellor was correct, and that both the appeals must be dismissed: as both sides have appealed there will be no costs.

(a) 6 & 7 Vict. c. 35.

1843.



1843.

May 31.

1844.

April 17.

A., by several deeds of the same date, granted, for valuable considerations, several annuities or rent-charges for lives, to be issuing and payable out of certain real estates, of which he was the owner, reserving to himself and his heirs, in each case, a power to repurchase the annuity, on payment, at three months' notice, of the original price, together with a half-yearly payment of it in advance.

Each annuity was secured by the personal covenant of the grantor, by clauses of distress and entry in case it should be a certain number of days in arrear, and by a warrant of attorney to confess judgment against the grantor for double the original price. And by another deed of even date which recited the annuities as being respectively subject to "a proviso for redemption or repurchase," the real estates on which they were charged, were conveyed to trustees for a term of years, with a power of sale to secure the regular payment of them, and subject thereto on trust for the grantor. The grantor by his will charged his real estates in aid of his personal estate with the payment of his debts, other than mortgage debts, and subject thereto, devised them in strict settlement.

Held, (reversing the judgment below,) that the annuities were to be treated as securities for the repayment of loans, and consequently that the value of them (there being no personal assets for their payment) was, by virtue of the will, a charge upon the corpus of the real estates, and that the tenant for life of the real estates, as between him and the remainder-man, was only liable to keep down the interest on such value.

BULWER v. ASTLEY.

WILLIAM EARLE BULWER, by his will, dated the 21st of *February* 1803, directed that his funeral and testamentary expenses, and all his debts and legacies should be paid and satisfied as soon as conveniently might be after his death. He then gave several pecuniary legacies and annuities, and authorised and empowered his executors to provide funds for answering the several annuities thereby given, either by investing so much money in the purchase of stock in the public funds or on real securities, as would produce an annual income sufficient to discharge the same respectively (which money so to be invested, was, after the determination of such respective annuities, to return to and become part of his personal estate for the purposes of that his will), or by sinking money in the purchase of annuities during the lives of the annuitants respectively, or by any other advisable method, at the discretion of his executors. He then devised all his real estates to his executors, upon trust in the first place to raise by mortgage a sum sufficient in aid of his personal

personal estate, to pay and discharge his debts, except those due on mortgage, and the annuities and legacies thereby given, and his funeral expenses; and upon further trust, out of the annual rents, and profits, to raise and levy the yearly sum of 500*l.* to form an accumulating fund for the payment of the principal of the mortgage debts which should be charged on his real estates at the time of his death, until they were all paid off; and subject to such trusts, he directed that his trustees should hold the estates on trust for the plaintiff for life, with remainder for his first and other sons in tail with several remainders over.


At the time of the testator's death, which happened in the year 1807, his real estates were subject to a great number of mortgages, and they were also charged with certain annuities or rent charges which he had granted by indentures for valuable considerations.

By one of those indentures, dated the 22nd of *August* 1806 and made between *William Earle Bulwer* (the testator) of the one part, and *John Bentley* and *Kirk Boott* of the other part, after reciting a memorandum of agreement dated the 12th of *July* 1806, by which it was agreed that *W. E. Bulwer* should on or before the 12th of *August* then next, or as soon afterwards as conveniently might be, in consideration of the sum of 3500*l.* to be paid by the said *J. Bentley* and *K. Boott* in equal proportions, convey and assure unto the said *J. Bentley* and *K. Boott* as tenants in common, their respective executors, administrators and assigns, an annuity or clear yearly rent charge of 389*l.* for the lives of four persons to be nominated by the said *J. Bentley* and *K. Boott*, and the life of the survivor, such annuity or rent charge to be charged upon and issuing and payable out of the hereditaments and premises thereafter mentioned; and
that

1843.

BULWER
v.
ASTLEY.

1843.


BULWER
 v.
ASTLEY.

that all expenses attending the sale and purchase of the said annuity, and of investigating and perfecting the title to the estates upon which it was to be secured, should be borne and paid by the said *W. E. Bulwer*; and that it should be lawful for the said *W. E. Bulwer*, his heirs, executors, administrators and assigns, to repurchase and buy up the said annuity or rent-charge upon the terms and conditions thereafter mentioned. And further reciting that, in part performance of the said agreement, the said *W. E. Bulwer* had executed a warrant of attorney, bearing even date with that indenture, to confess judgment against him at the suit of the said *J. Bentley*, and *K. Boott* for the sum of 7000*l.* and costs of suit, for better securing the due payment of the said annuity or rent charge, at or on the days and times and in manner thereafter mentioned. It was witnessed that in further pursuance and performance of the said agreement and in consideration of the sum of 3500*l.* then paid by the said *J. Bentley* and *K. Boott* in equal proportions to the said *W. E. Bulwer*, he the said *W. E. Bulwer* did grant, bargain, sell, and confirm unto the said *J. Bentley* and *K. Booth*, as tenants in common, their respective executors, administrators and assigns, one clear annuity or yearly rent-charge of 389*l.*, to be charged upon and to be issuing and payable during the term of 99 years if four persons therein named, or the survivors or survivor of them, should so long live, from and out of the hereditaments and premises therein mentioned, and to be payable by two equal half-yearly payments on the 22nd of *February* and the 22nd of *August* in every year, with a proportional part of the said annuity or rent-charge from such of the said half-yearly days of payment as should next precede the death of such survivor. And the said *W. E. Bulwer* thereby covenanted that if the said annuity or rent-charge should be unpaid by the space of fourteen days after any of the days appointed for the payment thereof, it should be lawful for the said *J. Bentley* and

and

and *K. Boott*, there respective executors, &c. to enter into and distrain upon the said hereditaments and premises for the amount so in arrear, and all costs &c., and if the said annuity or rent-charge should be unpaid by the space of twenty-eight days, it should be lawful for them to enter upon the said hereditaments and premises, and to receive and take the rents and profits thereof until they should thereby be paid and satisfied the said annuity or rent-charge, and the arrears thereof, and all costs &c. And the said *W. E. Bulwer* further covenanted to pay the said annuity or rent-charge, and such proportional part thereof as aforesaid, at the days and times, and in manner thereinbefore mentioned. And the said *J. Bentley* and *K. Boott* also covenanted that if *W. E. Bulwer*, his heirs, executors, or administrators should, at any time after the 12th of *August* 1808, be desirous of repurchasing the said annuity or rent-charge, and should give to the said *J. Bentley* and *K. Boott* their respective executors, administrators, or assigns, three calendar months' notice in writing of such desire, and upon the expiration of such notice or at any time afterwards, upon giving three calendar months' such notice, should pay to the said *J. Bentley* and *K. Boott*, their respective executors, &c., the sum of 3694*l.* 10*s.* being the original purchase-money of the said annuity or rent-charge, and one half-yearly payment thereof in advance, together with all arrears that should then be due on the said annuity, and also a proportional part of the same from the last day of payment thereof preceding such repurchase, up to and inclusive of the day of payment of such repurchase-money, and all costs which should have been incurred in recovering the payment of the said annuity when in arrear, then the said *J. Bentley* and *K. Boott*, their respective executors &c., should and would accept the said sum of 3694*l.* 10*s.* as and for the price of repurchase and in satisfaction and full discharge

1843.

BULWER
v.
ASTLEY.

1843.

BULWER
v.
ASTLEY.

charge of the said annuity, and then and from thenceforth the said annuity or rent-charge, and all payments in respect thereof, and all powers and authorities therein contained for recovering the same, should cease and determine, and the said *J. Bentley* and *K. Boott*, their respective executors, &c., should and would at the costs of the said *W. E. Bulwer*, his heirs &c., deliver up the said indenture to be cancelled, and acknowledge satisfaction on the record of the said judgment.

By another indenture of the same date and in the same form as the last, the same estates were, in consideration of 500*l.*, charged with an annuity of 55*l.* 11*s.* for three lives, to one *Cordelia Skeeles*. And both those annuities were further secured by an indenture of demise of the same date, by which the estates out of which the annuities were made payable, were conveyed to trustees for a term of 3000 years on trust for sale, in case either of the annuities should at any time be sixty days in arrear, and in the meantime on trust for the testator. (*a*)

This suit was instituted in the year 1808 (the Plaintiff being then an infant) for the execution of the trusts of the will. The Master, in his report upon the usual reference as to the debts due from the testator at the time of his death, made no mention of the annuities, but in his report under another reference he included the annuities granted by the testator during his lifetime, as well as those bequeathed by his will, amongst the incumbrances affecting the real estates.

At the hearing of the cause for further directions before the Vice-Chancellor (Sir *J. Leach*) on the 8th of
March

(*a*) This indenture, in reciting the former ones, spoke of the clause of repurchase sometimes as “a proviso for redemption or repurchase,” and sometimes as “a proviso for redemption.”

March 1822, being two years after the Plaintiff had attained twenty-one, an order was made, by which it was amongst other things declared, that the Plaintiff, having been let into the receipt of the rents and profits of the real estates, was bound to keep down the annuities from the time he attained his age of twenty-one. And shortly after the date of that order, an Act of parliament was obtained, under the sanction of the Court, and at the instance of the Plaintiff, by which the real estates of the testator were vested in certain persons on trust, by a transfer or consolidation of the existing mortgages, or by a new mortgage, and, subject to such mortgages, by a sale of certain parts of the estates, to raise a sum of money sufficient to pay off all the mortgages and incumbrances mentioned in the Master's report (*except annuities*), including the specialty and simple contract debts of the testator.

1843.

 BULWER
 v.
 ASTLEY.

The Plaintiff continued to pay the annuities out of the rents and profits of the estates, in pursuance of the order of the 8th of *March* 1822, down to the year 1842, when he presented a petition of rehearing against so much of that order as directed him to keep down the annuities; alleging that as to the annuities granted by deed he had only lately discovered, by inspection of the deeds, which had been brought into the Master's office for the prosecution of some recent enquiries, that those annuities, although secured on the real estates, were in fact debts of the testator, to which he had made himself personally liable, and therefore contending that they ought to have been provided for under the general charge in the will for the payment of the testator's debts, and that the annuities bequeathed by the will ought also to have been raised and provided for out of the personal estate or by a mortgage of a sufficient part of the real estates according to the directions of the will, and that the

1843.

BULWER

v.

ASTLEY.

value of the annuities at the time when the Plaintiff came of age ought now to be ascertained; and that he ought to be charged with interest only, at 4 per cent., on such value, and to be reimbursed out of the estate what he had overpaid.

The appeal now came on to be heard.

Mr. *Tinney*, Mr. *Humphry*, and Mr. *Blunt*, for the Appellant, the tenant for life.

It will not be disputed that as to the annuities bequeathed by the will the order in question is erroneous, inasmuch as those annuities are by the express terms of the will to be provided for out of the personal estate or in default that by mortgage of the real estates. But we submit that the order is also erroneous as regards the annuities granted by deed. Independently of the notorious fact, that what are called sales of annuities are generally mere contrivances for obtaining loans of money at high rates of interest, the provisions of the deeds in this case afford positive evidence that the present transactions were of that nature. First, there is the stipulation that the grantor should pay the expenses: secondly, there is the proviso for repurchase or redemption, (for the words are used indiscriminately,) and the personal covenant of the grantor; both of which have in former cases been held to be characteristic of a loan as distinguished from a sale: *Floyer v. Sherard* (a), *Lawley v. Hooper* (b), *Mellor v. Lees* (c): thirdly, there is the warrant of attorney to confess judgment for double the amount of the sum advanced, which shews still more conclusively that the essence of the transaction in each case

(a) *Amb.* 18.

(c) 2 *Atk.* 494.

(b) 3 *Atk.* 278.

case was a loan of money and not the sale of an interest in land.


1843.

BULWER
v.
ASTLEY.

If that be so, it follows that the effect of the transactions was, to establish the relation of debtor and creditor between the parties. It is true that the lender had not the right, usually incident to that character, of recovering the money advanced, inasmuch as the contract gave to the borrower the option of repaying the loan, either in a gross sum or in the form of an annuity: but the relation of debtor and creditor did not the less subsist, because the rights and remedies usually incident to it were modified by the peculiar terms of the contract. In the case of a *Welsh* mortgage, the mortgagee has no right to foreclose or to bring an action for the recovery of the sum advanced, but only a right to receive the rents and profits of the estate till he has been repaid principal and interest; but it has nevertheless been decided that the heir of the mortgagor is entitled to have the personalty applied in ease of the real estate: *Howel v. Price*. (a) The authority of that decision was recognised in *Longuet v. Scarwen* (b), and the principle of it extended to an annuity transaction like the present; the question there being whether the annuity, which was charged on land and limited by the terms of the deed to the grantee and his heirs, but made redeemable on payment, at a quarter's notice, of the principal sum advanced, was, as between the real and personal representative of the grantee, to be considered real or personal estate: and on the principle that, from the nature of the transaction, the grantor and grantee stood in the relation of debtor and creditor to each other, and that the grant of the annuity was only one of two ways agreed upon between the parties for the repayment of the loan, Lord *Hardwicke* decided

(a) *Prec. Chan.* 477.

(b) 1 *Vez.* 402.

1843.

 BULWER
 v.
 ASTLEY.

decided that the annuity was personal estate, and that the heir was a trustee of it for the executor. That decision, involving and affirming as it does the principle for which we now contend, is a distinct authority in support of this appeal: and the result is, that, at the time of the testator's death, the annuities constituted debts within the meaning of the charge in the will, and as such ought to have been provided for out of the corpus of the real estate, there being no personal assets for their payment.

Mr. *Roupell* and Mr. *Collyer*, for the Respondent, the remainderman in tail.

As to the annuities granted by the deed the order is right. The whole of the argument on the other side proceeds upon the assumption that those annuities were intended merely as securities for loans of money: but the deeds will bear no such construction. The recitals in them are not, like the recital in a mortgage deed, that the grantor had applied to the grantee to lend him a sum of money, but that the grantor had agreed to convey and assure a rent-charge, which is the form of recital in a deed of sale. The clause of repurchase, so far from giving to the transaction the character of a loan, leads to a contrary inference, unless it is to be treated as equivalent to the ordinary redemption clause in a mortgage, which, in the present state of the law, it cannot be. The cases cited in support of that position were decided at a time when the sale of an annuity with a power of repurchase was looked upon as usurious, and on that ground the Court allowed such an annuity to be redeemed upon the principle of an ordinary mortgage, that is, by treating the past payments of the annuity as payments on account of interest and principal. But that doctrine has long since been exploded. *Irnham v. Child* (a), *Fox v. Macreth*. (b) And the reservation of a power of repurchase in the sale of an annuity or rent-

(a) 1 B. C. C. 92.

(b) 2 B. C. C. 400. See p. 412.

rent-charge differs now in no respect from a similar reservation in the sale of the land itself, in which case it was never supposed to give to the transaction the character of a mortgage. "A clause of repurchase in the grant of an annuity," says the learned author of the *Essay on Uses and Trusts* (a), "is introduced upon the same principle that a vendor of an estate in fee simple stipulates with his vendee that he may be at liberty within a given time and for a certain sum, to repurchase the estate. An annuity, granted subject to a clause of repurchase, differs from a mortgage or security for money in these points: in a mortgage the principal debt still continues, until the equity of redemption be foreclosed; but upon the purchase of an annuity the principal is gone for ever, and consequently, if the repurchase be made, the money paid upon that occasion is not in discharge of a debt, but as the consideration for a new purchase."

1843.
BULWER
v.
ASTLEY.

If such be, according to the present doctrine of the court, the effect of the clause of repurchase, there is nothing else in the deeds which will justify the court in treating the annuities as securities for loans. They are, in the first instance, charged upon and made payable out of the real estates; and, where land is primarily charged, the tenant for life must bear the burden during his time: *Tracy v. Hereford* (b), *Revel v. Watkinson* (c); and the addition of a personal covenant by way of collateral security will not shift the burden to the personal estate: *Bagot v. Oughton* (d), *Evelyn v. Evelyn* (e), *Coventry v. Coventry* (g), *Edwards v. Freeman* (h) *Lanoy v. The Duke of Athol* (i), *Tweddell v. Tweddell* (k), *Shafto v. Shafto* (l), *Ex parte Digby*. (m)

As

(a) Vol. ii. p. 312.

(b) 2 B. C. C. 128.

(c) 1 Vez. 93.

(d) 1 P. Wms. 347.

(e) 2 P. Wms. 659.

(g) *Ibid.* 222.

(h) *Ibid.* 435.


(i) 2 Atk. 444.

(k) 2 B. C. C. 101.

(l) 1 Cox, 207.

(m) *Jac.* 235.

1843.


BULWER
v.
ASTLEY.

As to the case of *Longuet v. Scarwen*, even supposing it to be an authority for treating these transactions as loans, which, for the reason already stated, we submit that it is not, it is no authority for holding that the annuities, that is, the present value of them at the testator's death, constituted debts within the meaning of the charge in this will: on the contrary, it is rather to be inferred from Lord *Hardwicke's* reasoning in that case, that if the question had been whether the value of the annuities, at the grantor's death, constituted a debt, he would have decided in the negative, for in the case of *Howel v. Price*, to which he refers, the reason expressly assigned by the Court for holding that the sum originally advanced upon the mortgage security still constituted a debt from which the heir of the mortgagor was entitled to be exonerated out of the personal estate, was, that although the mortgagee had no power to recover it by action of debt or covenant, yet he had a remedy for it by taking possession of the real estate, and paying himself out of the rents and profits. In the present case the annuitants have no such remedy for any thing beyond the instalments of the annuity as they accrue due.

Even where an annuity is secured by a personal covenant only, the annuitant is not a creditor for the present value of it at any particular time, but only for the arrears: *Read v. Blunt* (a); from which it follows, that in the administration of the estate of the grantor, the Court has no jurisdiction to set a value on the annuity. (b) A legislative provision was necessary to give that jurisdiction in bankruptcy (c), for there is no debt until the annuity is in arrear, and then only for the

amount

(a) 5 Sim. 567.

(b) But see *Franks v. Cooper*, 4 Ves. 763., in which case, however, the annuity was secured by

the penalty of a bond, which had become forfeited at law by the annuity having fallen into arrear.

(c) 6 G. 4. c. 16. s. 54.

amount of the arrear. How, then, can the present value of these annuities at the testator's death, or at any other period, be considered debts within the meaning of the charge in the will? What the testator has directed is, that his debts shall be paid and satisfied, and it will not be contended that, under that direction, the executors would have been warranted in repurchasing the annuities: but yet that is the only way in which, if considered as debts, they could have been "paid or satisfied." Those words alone, are sufficient to shew that the testator could not have intended to include these annuities under the description of his debts.

1843.
BULWER
v.
ASTLEY.

Mr. Tinney, in reply.

The LORD CHANCELLOR.

1844.
April 17.

I think the annuity or rent-charge in this case was only a security for the money advanced, and that it was so intended by the parties. The mode of borrowing money upon annuity is of common occurrence. The effect of the transaction is, that the money borrowed is to be repaid by instalments, consisting partly of interest and partly of principal: whether the annuity be for a term of years or for a life or lives, the transaction is in substance the same. The value of the life, in respect of its probable duration, is a matter of calculation, and, as the principal is put in hazard, the amount of the interest is not regulated by the Statute of Usury, which is the only material distinction.

In the case now before the Court, the deed contains a clause for the repurchasing of the annuity, which cannot, I think, in this case be distinguished from a clause of redemption, which has always been considered a very strong, if not a decisive circumstance, to shew that the transaction was in reality a loan, and that the convey-

1843.

BULWER

v.

ASTLEY.

ance was intended only as a security. In *Floyer v. Sherard* (a), Lord *Hardwicke* took the distinction between a sale of an annuity absolutely, and the sale of a redeemable annuity, which, he said, was considered by the Court as a loan.

Here the sum stipulated to be paid for the repurchase is "to be accepted and taken in satisfaction and full discharge of the annuity, yearly rent-charge, &c., and all powers for enforcing it shall thenceforth cease and determine," &c. Although the word repurchase is used, this is in substance a stipulation for redemption: it would, I think, be difficult to construe it otherwise; and in fact in the indenture of demise between the same parties, and part of the same transaction, the proviso is described as a proviso for repurchase or redemption; and this is several times repeated, using the words indiscriminately and in the same sense — a circumstance which also occurred, and was relied upon by the Court, in *Longuet v. Scawen*. (b) In that case Lord *Hardwicke* is reported to have said, "It is well known that the Court leans extremely against contracts of this kind, where the liberty of repurchasing is made at the same time and concomitant with the grant." "There is, indeed," he observes, "a distinction in the nature of the transaction between a power of redeeming and of repurchasing, obtained by usage which governs the sense of words: but where the stipulation for the liberty of repurchasing is part of the same transaction, the Court goes very unwillingly into that distinction, and endeavours, if possible, to bring them to be cases of redemption." This principle applies directly to the present case: the stipulation for the repurchase or redemption (for the terms are used synonymously) was contemporaneous with the grant, and a part of the same transaction.

The

(a) *Ambl.* 18.(b) 1 *Vez.* 402.

The deed also contains a stipulation similar to one relied upon by the same learned Judge in the case of *Lawley v. Hooper* (a), viz. the notice required of the intention to repurchase, and the condition for the repayment of the original purchase-money, with all arrears, and half a year's interest in addition: so as to allow ample time, according to the expression there used, "to find out another hand to take the money," and to be secure of the interest in the meantime: *Mellor v. Lees*. (b)

1843.
BULWER
v.
ASTLEY.

It is not immaterial to advert to the personal covenant for payment of the annuity. In the event of any omission, an action might be immediately brought upon this covenant; but there would be no present remedy against the property: the clause of distress could not be enforced until fourteen days after default made, the power of entry not till twenty-eight days, and the authority to sell not before sixty days. This leads to the inference that the estate was looked to in this transaction only as a security. The personal estate having been augmented by this advance, that estate would of course be the primary fund to discharge the claim.

With respect to the act of parliament, it does not appear to me to affect the question, which is merely as to how the debt is to be paid as between the tenant for life and the persons in remainder.

I have mentioned only one annuity: there are in fact several, but they all depend upon the same principle. The result is, that the decree should have directed the annuities to be valued, and the tenant for life to keep down the interest of the estimated value.

It was admitted, I think, that the decree must be varied as to the annuities given by the will.

(a) 3 *Atk.* 278.

(b) 2 *Atk.* 494. See p. 496.

1844.

1844.
May 3.

In the Matter of DYCE SOMBRE, a Lunatic.

Seemle, a petition to supersede a commission of lunacy will not be entertained unless the lunatic be either personally present in Court, or at least in such a situation as that he may be personally examined by the Lord Chancellor or some one under his authority.

Whether if a party who has been found lunatic escapes to a foreign country, and while resident there is pronounced by a competent tribunal to be of sound mind, the Lord Chancellor will give such credit to that decision as to entertain a petition by the party to supersede the commission, without requiring him first to return to the jurisdiction for the purpose of being personally examined, *Qu.*?

THIS was a petition by the lunatic to supersede the commission.

On the petition coming on to be heard,

Mr. *Bethell*, for the committee of the person, took a preliminary objection, that the lunatic, who was in this country when the commission was executed, was now residing at Paris, having escaped from the custody of the persons who had had the charge of him pending the appointment of a committee.

In support of the objection, he contended that it was essential to an application to supersede a commission or to traverse an inquisition, that the lunatic should submit himself to the personal examination of the Lord Chancellor, and that, for that purpose, he should either appear personally in Court, or at least be somewhere within reach. (a) Accordingly the order for a supersedeas always recited that, upon full examination in court, it appeared to the Lord Chancellor that the party had recovered of his lunacy. (b) In the present case the petitioner was in this dilemma: if he was insane, he had no ground for his application; if sane, his escape was in the nature of a contempt of the Court, which he must clear by surrendering himself, before he could be heard upon his petition.

Mr.

(a) 1 *Fonbl. Eq.* 60. n. *Col-
linson on Lunacy*, p. 325.

(b) *Shelford, Appx.* 639.

Mr. *Calvert*, on the same side, was proceeding to cite further authorities upon the practice, when

1844.

In re
DYCE
SOMBRE.

The LORD CHANCELLOR said :

I know of no instance where a commission has been superseded without the appearance of the lunatic. The party is not found lunatic upon affidavits: the enquiry takes place under the commission; witnesses are examined *viva voce*, the party himself appearing and being also examined by the jury. It would be extraordinary if, under such circumstances, the commission could be superseded upon the evidence of affidavits merely. Lord *Eldon* said it was a much more delicate matter superseding than issuing a commission: for issuing the commission is merely for enquiry; superseding it, terminates the enquiry. Why should I go into the enquiry if I cannot supersede the commission without the lunatic's appearance? I can conceive a case in which a commission might be superseded without the party's actually appearing in Court: for instance, the case of a person labouring under some physical infirmity, so that he could not be brought up. But he must still, I apprehend, be in such a situation as that he may be examined by persons acting under the authority of the Great Seal. That is my view at present, subject to what the other side may have to say.

Sir *T. Wilde* (with whom were Mr. *Wakefield* and Mr. *Walpole*) for the petition.

It is too much to say that an application of this kind can under no circumstances be entertained unless the petitioner be present. It may be true that a personal examination is the usual mode adopted by the Lord Chancellor for ascertaining the state of mind of the party; but it is not the only mode: and in some cases

1844.

In re
DYOR
SOMBRE.

it might not be the best mode. All that is required is, that your Lordship should be satisfied that the party is no longer of unsound mind. Now the petitioner in this case has been examined before the Prefect of Police at Paris, in consequence of an application made by his family to the British ambassador, that he might be delivered up to them as a person who had been found lunatic in this country: and the result of that examination was, that, upon the unanimous certificate of three physicians, he was pronounced sane, and the local authorities thereupon refused to deliver him up. That is a decision which this Court is bound to respect, for the question of a person's sanity of mind is to be determined by the tribunals of the country in which he is for the time being resident. The statute 4 G. 4., 1 W. 4. c. 65., and the other statutes that have from time to time been passed, giving jurisdiction to the Great Seal to deal with the property of parties found lunatic abroad, shew that, upon questions of that nature, foreign decisions are attended to and acted upon here.

[*The* LORD CHANCELLOR.]

If you put this as a case in which the question of sanity has been already decided by a competent tribunal abroad, that is a point which may deserve consideration.]

So convinced is the petitioner that, if the enquiry were fairly conducted, a jury of this country would come to a similar conclusion, that, if he could be sure of not being put under a restraint in the meantime, he would return immediately to prosecute this petition.

Mr. *Bethell* then undertook, on the part of the committee of the person, that, if the Petitioner would return to this country, no restraint should be imposed upon him, unless by the direction of the Lord Chancellor.

That

That proposal having been assented to on the other side,

1844.

In re
DYCE
SOMBRE.

The LORD CHANCELLOR said :

Judging from what I have heard of the conduct of this gentleman at *Paris*, I approve entirely of that arrangement, and I should wish him to be informed, that, if he will come over here, I shall allow no restraint to be put upon him, unless some act of violence should render it necessary. He should be told, that I have no expectation that any such act will be committed, and that my sole object will be to give him perfect security.

The petition may stand over until it shall be seen what course the petitioner will pursue.

TOLSON *v.* DYKES.

June 3. 8.

MR. KOE moved that the Plaintiff might be discharged out of the custody of the keeper of the Queen's prison, as to an attachment issued against him on the 6th of *March* 1834, for non-payment of costs, amounting to 14*l.* 12*s.* 5*d.*

Orders of Courts of Equity being by the 1 & 2 *Vict. c.* 110. s. 18. made equivalent to judgments, Held, that a party who had lain in prison under an attachment for non-payment of costs amounting to less than 20*l.*

In support of the motion he relied on the 48 *G. 3. c.* 123. and 1 & 2 *Vict. c.* 110. s. 18. contending that, as the latter act had made orders of Courts of Equity, for the payment of costs, equivalent to judgments, the prisoner

was entitled under the 48 *G. 3. c.* 123. to his discharge as to such attachment, although detainers had been lodged against him for non-payment of other costs in the same suit, amounting together to much more than that sum.

1844.

TOLSON

v.

DYKES.

prisoner was entitled, under the former act, to his discharge in respect of the attachment in question, having lain in prison under it more than twelve calendar months. And he cited an unreported case of *Gibson v. Curling* (a) in the Exchequer, in which a plaintiff, who had been taken in execution for non-payment of the costs of a non-suit amounting to less than 20*l.*, had been discharged on a similar ground.

Mr. *Wetherell*, *contra*, contended that the object of the legislature in the stat. of 1 & 2 *Vict.* was merely to give to creditors increased facilities for the recovery of their debts, in exchange for the right of imprisonment on mesne process, which that act had taken away; and that the latter part of the clause in question which provided that “the persons to whom any such monies, or costs, charges, or expenses should be payable should be deemed judgment creditors *within the meaning of that act*,” shewed that in this provision it was the benefit of the creditor, and not of the debtor that the legislature looked to. He also stated that detainers had been lodged against the prisoner for other costs, which had been ordered to be paid in the same suit, amounting together to much more than 20*l.*, and that one of such orders alone was for a sum exceeding 20*l.*; for which he could only be discharged under the Insolvent Act, so that even if he could obtain his discharge as to the others separately, such discharge would be nugatory.

The LORD CHANCELLOR.

I think the prisoner is entitled to be discharged as to this attachment.

The

(a) *Exch.* 27th Nov. 1843.

The 48 G. 3. c. 123. provides that persons in execution upon any judgment for any debt or damages not exceeding 20*l.*, who shall have lain in prison thereupon for twelve calendar months, shall, upon application to the Court, be entitled to their discharge as to such execution. That applies only to judgments in Courts of Law. But the stat. 1 & 2 *Vict.* c. 110. provides that all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, for the payment of costs, shall have the effect of judgments. If they are to have the effect of judgments they come within the scope of the former statute; for I don't think that the words "within the meaning of this act," in the subsequent part of the clause, were intended to control this part of it, which provides that such orders shall have the effect of judgments. The legislature did not intend that the statute should not operate for the benefit of the debtor as well as against him. The point appears to have been distinctly called to the attention of the Court of Exchequer, in the case of *Gibson v. Curling*. And on the authority of that case, and the reason of the thing, I think that is the true construction of the act.

The circumstance that the prisoner is detained under other similar orders does not, I think, affect his right to be discharged as to this.

1844.

TOLSON

v.

DYKES.

1844.

May 24.

In the Matter of the Princess BARIATINSKY, a
Lunatic.

At the hearing of a petition and counter-petition in lunacy, the one praying the confirmation of the commissioners' report, and the other simply opposing it, the counsel for the first petition is entitled to begin.

THIS case came on upon a petition to confirm the Commissioners' report approving of a committee, and a counter-petition praying that the report might not be confirmed.

Sir *Charles Wetherell*, for the first petition, claimed the right to begin.

Mr. *Erle* and Mr. *Stuart*, for the counter-petition, contended, that their petition was in the nature of exceptions to the report, and that, by analogy to the practice upon exceptions, they were entitled to begin. The confirmation of the report being of course, unless some exceptions were taken to it, convenience required that the nature and ground of the exceptions should be stated first.

The LORD CHANCELLOR.

This is not the case of particular exceptions to parts of the report, but in substance a general objection to the whole. The Commissioner has reported upon a complicated state of facts, and has come to a certain conclusion. It is that conclusion which is objected to; the whole merits, therefore, must now be gone into. I am to put myself in the situation of the commissioner, and to rehear the case. I think, therefore, that the most convenient course will be, that the same party should begin here, who began before the commissioner.

Sir *C. Wetherell* accordingly began.

NOTE. — The Secretary of Lunatics and the Registrar (*Colville*), upon being referred to by the Lord Chancellor, stated this to be the usual course in matters of lunacy.

1843.

THORPE v. MATTINGLEY. (a)

Nov. 4.

PENDING an appeal by the Defendants to the House of Lords, from a decree to account, the Master ascertained the amount due upon the account, and an order was made for payment thereof with costs by the Defendants, who paid the same accordingly; the Plaintiff entering into a recognizance to refund in case the appeal should succeed.

On the hearing of the appeal the decree was reversed, and the bill dismissed with costs, and the cause was remitted back to the Court below to do therein as should be just and consistent with that judgment.

The defendants thereupon obtained an order of this Court dismissing the bill with costs; but that order not having gone on to direct the repayment to them by the Plaintiff of what they had paid under the decree, they afterwards presented a petition for repayment of what they had so paid for costs. That petition was heard on the 18th of *April* 1843, and an order was made according to the prayer. They then presented another petition for repayment of what they had paid in respect of the account, which petition now came on to be heard.

Mr. *Bethell* and Mr. *Fleming* appeared in support of the petition.

Mr. *Swanston*, *contra*, insisted that the application
came

Where an order of this Court, made in pursuance of an order of the House of Lords reversing the decree below and dismissing the bill with costs, had omitted to direct repayment of a sum of money which had been paid by the Defendants to the Plaintiff under the decree, pending the appeal; the Court, on the petition of the Defendants, made a further substantive order for such repayment.

(a) *Suprà*, p. 200.

1843.

 THORPE
 v.
 MATTINGLEY.

came too late after an order had been made dismissing the bill; for by the effect of that order the suit was at an end, and the Court had no longer any jurisdiction over the parties personally. The petition, moreover, was vexatious, for the Defendants had their remedy upon the recognizance, and they had actually commenced proceedings to enforce it.

Mr. *Bethell*, in reply, said, the recognizance was given by two sureties, and the sureties being sued was no reason why the principal should not pay when he was called upon.

The LORD CHANCELLOR.

What is now asked is a consequence of the judgment of the House of Lords, and comes within the description of what is just and proper. It might have been done at the time the bill was dismissed, but I see no reason why it should not be done now. The order, therefore, must be according to the prayer of the petition.

MEMORANDUM.

On the conclusion of the argument in *Lancaster v. Evors* (*suprà*, p. 349.), the Lord Chancellor stated, that as it had been conceded at the bar that the case was not within the 38th Order of August 1841, he should consider it without reference to that Order. As to the application of that Order, see *Tipping v. Clarke*, 2 *Hare*, 391.

REPORTS

OF

CASES

ARGUED AND DETERMINED

1844.

IN THE

HIGH COURT OF CHANCERY.

Ex parte VAN SANDAU.
In the Matter of MARTIN.

Nov. 4. 7.

IN the month of *December* 1843 a petition and motion in this matter were depending in the Court of Review; Mr. *Van Sandau* being the solicitor for one of the parties, A single judge of the Court of Review, when sitting as the Court, has power to commit for contempt.

Semble, where a decision of the Court of Review is brought under the review of the Lord Chancellor by a simple appeal petition, without a special case, no appeal lies from his decision to the House of Lords.

Where the Court of Review had committed a party for a contempt, and had afterwards restrained him by injunction from prosecuting an action for false imprisonment against the party who obtained the order of commitment, the Lord Chancellor, upon both the orders being brought under his review by a simple appeal petition, without a special case, discharged the order for the injunction, on the ground that doubts might be entertained whether the form of the proceeding before him admitted of an appeal from his decision to the House of Lords, whereas a writ of error would lie from that of the court of law.

Whether the Court of Review has jurisdiction to restrain a party whom it has committed for a contempt, from suing the party who obtained the order of commitment in an action for false imprisonment: *quære*.

VOL. I.

H h

1844.

Ex parte
VAN SANDAU.

parties, and Messrs. *Turner* and *Hensman* for the other. After the Chief Judge of that Court had given judgment, but before the minutes of the order were finally settled, Mr. *Van Sandau* being dissatisfied with the judgment, published a printed circular, copies of which he distributed to several of his friends in open Court, containing various defamatory charges against Messrs. *Turner* and *Hensman*, and commenting in very severe and disrespectful terms on the judgment; the document being headed "A short statement of frauds by which the public are robbed under fiats in bankruptcy, and by which the profession of the law is brought into disrepute." In consequence of that publication Messrs. *Turner* and *Hensman* presented a petition, praying, amongst other things, that Mr. *Van Sandau* might be committed for a contempt of the Court. The petition was, at the request of the Chief Judge, heard before Sir *George Rose*, the other Judge of the Court, who thereupon made an order dated the 4th of *February* 1844, which, after reciting the petition and the circular, which was set forth at length in the form of a schedule to the petition, proceeded in these words: —

"The Court doth order that the said *Andrew Van Sandau* do stand committed to the custody of the keeper of the Queen's prison for his contempt of this Court in writing, printing, and publishing the paper so set out as aforesaid in the schedule to the said petition, and that a warrant do forthwith issue for that purpose; and that the said respondent do pay to the said petitioners the costs, charges, and expenses of, and occasioned by, this application, and of the said order, and of carrying the same into execution, and incidental thereto respectively."

After several unsuccessful applications by Mr. *Van Sandau* to Sir *George Rose* to discharge or vary that order,

order, on each of which occasions he was ordered to pay further costs, a warrant was issued in pursuance of the first order, under which he was, on the 19th of *February*, arrested and committed to prison.

1844.

Ex parte
VAN SANDAU.

On the 21st of *February* Mr. *Van Sandau* having presented a petition apologising for his conduct, and praying for his discharge, Sir *George Rose* made an order that, upon his depositing the sum of 200*l.* in the hands of the Registrar, to provide for the costs, charges and expenses, and costs, for which he was liable under the former orders, and which were then in course of taxation, and upon his undertaking to pay the same, and also the costs of, and occasioned by, that application, he should be forthwith discharged.

Mr. *Van Sandau* having thus obtained his discharge, brought an action in the Queen's Bench, for false imprisonment, against Messrs. *Turner* and *Hensman*, who pleaded the general issue, and also a special plea of justification under the order of the 4th of *February*, and the warrant issued in pursuance thereof. The Plaintiff joined issue upon the first plea, and delivered a demurrer to the second; whereupon Messrs. *Turner* and *Hensman* applied to the Court of Review for an injunction to restrain the Plaintiff from further proceeding in the action; and on the 8th of *May* the Chief Judge of the Court, before whom that petition was heard, made an order giving the Plaintiff liberty to obtain a rule or order, in the action, for amending his demurrer, and to amend it accordingly, by confining the causes of demurrer to three points, which were specified in the order, but restraining him from all further proceedings in the action, except for the purpose of proceeding to argument, judgment, and execution upon the demurrer when so amended; without prejudice, however, to any question which might be made or raised in the Court

1844.

Ex parte
VAN SANDAU.

of Review as to the validity or regularity of the order, warrant, arrest, or caption, or as to damages, or as to the propriety of thereafter trying the issue of fact raised by the plea of the general issue. (a)

Mr.

(a) The Order was in these terms:—This Court doth order, that the said parties, petitioners and respondent, and their counsel, attornies, and agents respectively, be and they are hereby restrained from all further proceedings in the said action at law till further order, subject only and except as hereinafter mentioned; but the said *Andrew Van Sandau* is to be at liberty to obtain, and the said petitioners are to consent to his obtaining, on or before *Tuesday* the 4th day of *June* next, a rule or order in such action for amending his said demurrer; and the said *Andrew Van Sandau* is to be at liberty to amend the same, and the causes of demurrer thereby assigned, by confining the causes of demurrer to the points which he is hereby permitted to raise in the said action as herein-after mentioned; and the said parties respectively, their counsel, attornies, and agents are to be at liberty to proceed to argument, judgment, and execution upon the said demurrer when amended as aforesaid, so far as the rules of law will allow; and the said *Andrew Van Sandau*, his counsel, attornies, and agents are to be at liberty, upon the argument and for the purposes of the said demurrer, when so amended, to contend that the Court of Review has not and had not in Fe-

bruary 1844, jurisdiction, power, or authority to commit for a contempt of such Court; and that it does not appear on the face of such order as stated in the said plea of justification, that the said *Andrew Van Sandau* was thereby ordered to be committed on the ground that in the judgment or opinion of the Court of Review an act or acts considered by the Court of Review to be a contempt of the said Court had been done by him; and also to contend that it appears on the face of such order that the committal thereby ordered was on the ground of an act or acts done by the said *Andrew Van Sandau* which by law did not form or amount to a contempt of the Court of Review; but the said *Andrew Van Sandau*, his counsel, attornies, and agents, are not further, or otherwise on the argument, or for any purpose of such demurrer or amended demurrer, to dispute or question the validity or propriety of the said order, and are, on the argument and for the purposes of the said demurrer when amended as aforesaid, and for the purposes of the judgment thereon, to admit the validity and propriety, regularity, formality, and sufficiency of such order in all other respects and particulars than the points which, so far as they shall be open and available at law on the said demurrer

Mr. *Van Sandau* being desirous of appealing from the two orders of the 4th of *February* and the 8th of *May*, and all the intermediate orders, applied to the Court of Review to settle a special case for that purpose, but some difficulties having occurred in settling the case, it was ultimately arranged, on the suggestion of Sir *George Rose*, and by leave of the Lord Chancellor, that the whole matter should be brought under the review of his Lordship by an appeal petition without a special case.

1844.

Ex parte
 VAN SANDAU.

An appeal petition was accordingly presented by Mr. *Van Sandau*, praying that the several orders above mentioned might be respectively discharged or varied.

The petition now coming on to be heard,

Mr. *Bagshawe* and Mr. *Rolt* appeared for the Petitioner.

Mr. *Swanston* and Mr. *Simon* for the Respondents.

The argument turned exclusively upon the orders of the 4th of *February* and the 8th of *May*.

To

demurrer when amended as aforesaid, liberty is hereby given to raise at law against the validity of the said order as aforesaid; and also to admit that, supposing the said order to have been legal, valid, and regular, the warrant, caption, and arrest thereunder were also legal, valid, and regular; but this order is to be without prejudice to any question which may be made or raised in this Court as to the

validity, or propriety, or regularity of such order, warrant, arrest, and caption, or either of them, or as to damages, or as to the propriety of trying the said issue of fact hereafter; and let the said petition in all other respects stand over, and the said parties respectively are to be at liberty to apply to this Court as to costs or otherwise touching any of the matters aforesaid as they may be advised.

1844.

Ex parte
VAN SANDAU.

To the former order it was objected —

First, that the circular, even admitting it to be a libel on the Judge to whom it referred, did not amount to a contempt of the Court; *Case of the Evening Post* (a), *Rex v. Almon* (b), *Charlton's Case*. (c)

Secondly, that, although the Court of Review had, by the 1 & 2 *W. 4. c. 56.*, power to commit for contempt, no single judge of that Court had such power; 5 & 6 *Vict. c. 122. s. 44.*; *Rex v. Faulkner*. (d) Thirdly, that the order was invalid, inasmuch as it contained no express adjudication that a contempt had been committed; *Long Wellesley's Case* (e), *Charlton's Case* (g), *Green v. Elgie*. (h) Fourthly, that that part of the order which directed the appellant to pay charges and expenses, as well as costs, was wholly without precedent, it being contended that charges and expenses, as distinguished from costs of suit, were never given except in favor of parties in the character of trustees, and not even then unless there was a trust fund out of which they could be paid.

With respect to the order of the 8th of *May*,

It was contended on the part of the appellant, that the Court of Review had no jurisdiction, analogous to that of the Court of Chancery, by way of injunction; but that, even assuming that such a power belonged to it for some purposes, it did not extend to cases like the present; *Ex parte Glossop* (i), where Lord *Eldon* refused to interfere, upon petition, with an action brought by the bankrupt to impeach the validity of the commission, saying that the only remedy was by bill: that the present case was much stronger

(a) 2 *Atk.* 469.

(b) *Wilmot's Judgments*, 243.

(c) 2 *Myl. & Cr.* 316.

(d) 2 *Mont. & Ayr.* 311.

(e) 2 *R. & Myl.* 639.

(g) *Ubi supra*.

(h) 8 *Jurist*, 187.

(i) 2 *Gl. & Jam.* 268.

stronger, the party restrained being a stranger to the jurisdiction in bankruptcy: and that Sir *J. Crosse* had refused to make such an order under circumstances precisely similar in *Ex parte Elgie*. (a) But that, at all events, the form of the order in this case was bad; for every demurrer at law was general, and, therefore, although counsel should, in compliance with the injunction, forbear to raise any points but those which were specified in the order, the Court would be bound *ex officio* to notice them in its decision, for otherwise there would be error on the record.

1844.

Ex parte
 VAN SANDAU.

On the other hand, it was argued, that a jurisdiction, analogous to that of courts of equity, by injunction, had long been familiarly exercised in bankruptcy, both before the establishment of the Court of Review and since; *Ex parte Fletcher* (b), *Ex parte Figes* (c), *Ex parte White* (d); and that in the case of *Ex parte Glossop* there must have been special circumstances not noticed in the report, as Lord *Eldon* himself had two years afterwards, in *Ex parte Leigh* (e), made a similar order to that which he was there represented to have refused on the ground of want of jurisdiction; and on the authority of that decision, Sir *J. Leach* in *Ex parte Hill* (g) considered the jurisdiction settled, and made another similar order. That it was idle to attempt to distinguish this case from those, on the ground of the party being a stranger to the jurisdiction, when, independently of his character of solicitor of the Court, he had brought himself within the jurisdiction by the contempt which he had committed. It being therefore beyond dispute that a jurisdiction of this kind belonged to the Court, there

was

(a) Not reported.

(b) 1 *V. & B.* 350.

(c) 1 *Gl. & Jam.* 122.

(d) 4 *Deac. & Ch.* 279. See

also *Ex parte Harding, Buck.*

24.

(e) 2 *Gl. & Jam.* 332.

(g) *Mont.* 9.

1844.

Ex parte
 VAN SANDAU.

was no reason why it should not be exercised in the present case, as it was clear that, if the circumstances had occurred in the Court of Chancery, that Court, would not have allowed the validity of its order to be questioned in a court of law, but would have taken the matter into its own hands, and, if any irregularity had occurred in the commitment, would have referred it to the Master to award proper compensation; *Frowd v. Lawrence*. (a) As to the form of the injunction in this case, it was not for the appellant to complain of it, as it was for his benefit that the order was made in that qualified form, while in *Frowd v. Lawrence* and other similar cases the order had been absolute.

In the course of the argument,

The LORD CHANCELLOR (referring to what he had himself laid down in *Lord Brougham v. Dicus* (b)) observed, that it did not follow from the Act of 1 & 2 W. 4. c. 56. that the Court of Review had now all the powers which the Lord Chancellor formerly had when sitting in Bankruptcy. Whatever authority the Lord Chancellor had as head of the Court of Bankruptcy, was transferred by the Act to the Court of Review; but when the Lord Chancellor sat in Bankruptcy, he had, in addition to that, the powers attached to the office of Chancellor.

Nov. 7.

The LORD CHANCELLOR.

The facts of this case may be stated in a very few words. A petition and a motion were depending in the Court of Review, in the bankruptcy of a person of the name of *Martin*. Mr. *Van Sandau* was the solicitor

(a) 1 J. & W. 655.

(b) 6 Car. & P. 249. See pp. 263. 266.

solicitor on one side, and Messrs. *Turner* and *Hensman* on the other. An order was made upon the petition and motion. Mr. *Van Sandau* was dissatisfied with the decision, and he wrote, printed, and published a libel upon the Court of Review, upon the eminent Judge of that Court, and upon Messrs. *Turner* and *Hensman*, with respect to this matter.

1844.

Ex parte
 VAN SANDAU

Messrs. *Turner* and *Hensman* complained by petition to the Court of Review; and the Court, after considering the subject, made an order, directing that Mr. *Van Sandau*, for his contempt in publishing the libel set forth in the schedule to the petition, should be committed to the custody of the Marshal of the Queen's Prison. He was committed accordingly: he afterwards apologised, and was discharged. For the part which Messrs. *Turner* and *Hensman* took in this transaction, Mr. *Van Sandau* commenced an action against them in the Court of Queen's Bench. He filed his declaration; they pleaded in justification the order of the Court of Review and the warrant, both of which were set out at length in the plea. To this plea Mr. *Van Sandau* demurred, and the case now stands for argument in the Court of Queen's Bench.

An application was made to the Court of Review to restrain Mr. *Van Sandau* from proceeding in this action; and the Court made a qualified order on this application, restraining him from proceeding except for the purpose of raising certain questions. The Court of Review gave him permission, on the argument upon the demurrer, to object to the proceedings of the Court on three distinct grounds, but restrained him, his counsel, &c. from raising any other questions upon the demurrer, except those pointed out by the Court of Review.

This

1844.

Ex parte
 VAN SANDAU.

This is the state of things; and from this, and some consequential orders, Mr. *Van Sandau* has appealed to this Court; and the question is, what course should be taken with respect to these matters.

It was, in the first place, contended, that no contempt had been committed. Now, any person who reads the publication which is admitted to have been written, printed, and circulated by Mr. *Van Sandau* must be satisfied that it is a gross and impudent libel upon the Court and the learned Judge, imputing to them the most unworthy motives in pronouncing the judgment of which Mr. *Van Sandau* complains; and a more gross and scandalous libel upon the administration of justice never was published. It was circulated while the matter was still pending, and before the minutes of the order were finally settled. It further appears, that it not only was extensively circulated, but that it was even distributed by Mr. *Van Sandau* in the Court itself, and, in the presence of the learned Judge, to the solicitors who were attending the business of the Court. That such conduct was a contempt, a gross contempt, of the Court, no reasonable man can for an instant doubt. Lord *Hardwicke*, in the case of the *General Evening Post* (a), in enumerating the different kinds of contempts, states as one distinct head of contempt the "scandalizing of the Court itself." I might further refer upon this point, if it were necessary, to the elaborate judgment of Chief Justice *Wilmot*, written, but not delivered, in the case of *The King v. Almon*, in which the subject is learnedly and elaborately considered.

The next point urged was that the Court of Review possessed no authority to commit for contempt. But by the act 5 & 6 W. 4. c. 29. s. 25., it is declared that the
 Court

(a) 2 Atk. 469.

Court of Review shall be a Court of Record, and may have, use, and exercise all the powers, rights, and privileges of a Court of Record, as fully to all intents and purposes as the same are used by any of His Majesty's courts of law at *Westminster*; and the Court is in terms authorised to commit for contempt. But a distinction was taken. It was said that, under this clause, a judge sitting alone cannot commit for a contempt. This requires some explanation. The Court originally consisted of four judges; the number was afterwards reduced to three, and certain powers were given to them sitting as the Court of Review; but the judges might also sit alone in performing the other duties prescribed by the act. When, therefore, the act says that a judge or commissioner sitting alone shall not commit for a contempt, it obviously means a judge sitting not as the Court of Review, but acting as a judge in the exercise of the other duties prescribed by the statute. By a subsequent act, power is given to a single judge to constitute the Court of Review; but the judge so sitting as the Court of Review does not come within the exception as to commitments for contempt, which relates only to a single judge sitting in his individual character for the purposes already stated, and not as the Court of Review. The objection originates in a misapprehension of the meaning of the act of parliament, and is obviously unfounded.

1844.

Ex parte
 VAN SANDAU.

The next question relates to the form of the order. It is said that the order is vicious, as it contains no adjudication of a contempt having been committed. The order is in this form: It recites the petition and the libel, the latter being annexed to the petition as a schedule, and then it goes on in these words, "For his contempt in publishing the libel in the schedule to the said petition mentioned, this Court doth order him to be committed

1844.

Ex parte
VAN SANDAU.

committed to the custody of the warden of the Queen's prison until further order." It is said that this does not amount to an adjudication, that Mr. *Van Sandau* had been guilty of a contempt, but merely assumes his guilt, and upon that assumption the order directs that he be committed to prison.

Different precedents were referred to : first, Mr. *Long Wellesley's* case before Lord *Brougham*. In that case there was a distinct adjudication that a contempt had been committed. The order recites the facts, and contains the decision of the Court on those facts, declaring "that the conduct of Mr. *Long Wellesley* was a gross and aggravated contempt of Court, and that as Mr. *Wellesley*, notwithstanding admonition, persisted in such his contempt, the Court ordered him to be committed to the Fleet Prison." In that case, therefore, there was a precise and distinct adjudication. The next case was that of Mr. *Lechmere Charlton* before Lord *Cottenham*. In that case also there was an adjudication. The facts are stated, and the order runs thus : — "The Lord Chancellor, upon taking the said matter into consideration, and deeming the conduct of the said *Lechmere Charlton* therein a contempt of this Court, doth think fit, and so order, &c." The order in the case of Mr. *Lechmere Charlton* was founded on that made by Lord *Hardwicke* in the case of *Martin (a)* ; and which is in precisely the same terms ; and there is no doubt that Lord *Cottenham* framed his order upon that precedent, which has therefore the sanction of those two distinguished and learned Judges. The case of *Green v. Elgie*, in the Court of Queen's Bench, was also cited. The order in that case was made by the Court of Review, committing *Green* for contempt. He brought an action against *Elgie* for the

(a) 2 *Russ. & Myl.* 674. n.

1844.

Ex parte
VAN SANDAU.


the part which he had taken in the proceeding. The order was set out in the plea of justification; but the Court of Queen's Bench thought it defective, as it did not adjudge that any contempt had been committed. The order stated "that *Elgie* had preferred his petition, praying that *Green* might be committed for his contempt of the order in the petition mentioned or referred to; and that on reading the petition, the affidavits, and the former order of the Court, the Court ordered that *Green* should be committed for his contempt in the said petition mentioned or referred to."

In all criminal cases it is necessary that there should be a charge, a finding, and a conviction, as a foundation for the sentence. Every thing should be strictly and accurately pursued; and if in any one of these three points a substantial defect should appear, it would be a ground for reversing the proceeding.

The question therefore will be, whether there is in this case a sufficient adjudication: the words are "for his contempt in writing, printing, and publishing the paper set out in the schedule to the petition." Does this amount to a sufficient averment that Mr. *Van Sandau* published the paper in question, and to an adjudication that in so doing he had committed a contempt? Now, considering that I am sitting here in bankruptcy, and that, from the form in which the question has come before me, doubts may be entertained whether there could be an appeal from my decision; and adverting to the authorities which have been referred to, I think I ought not to give an opinion in affirmance of the sufficiency of the order, and at the same time follow it up by an injunction to restrain the party from taking the opinion of a court of law upon the subject.

It

1844.


Ex parte
VAN SANDAU.

It was contended that the Court of Review had no power to grant an injunction, at least not an injunction of this sort; and the particular form of the injunction has been made the subject of comment. I think it unnecessary to decide the former of these questions; for, assuming that the Court of Review had authority to grant the injunction, the question would still remain to be considered, whether I ought, under the circumstances to which I have adverted, to sanction the injunction in such a case as the present.

Then as to the form of the injunction: when the injunction was issued, the record in the Court of Queen's Bench was complete: there was a declaration, a plea, and a demurrer. The Plaintiff is permitted upon the demurrer to argue certain questions and not others. Three objections are mentioned in the order, upon which alone he is permitted to insist. If the order of commitment is defective in substance, the injunction would be ineffectual. But the defect relied upon, if it is a defect, is one of substance, and not of form. It must appear on the record; and the Court of Queen's Bench would, in the proper discharge of its duty, and whether the objection were made by counsel or not, take notice of it, and give judgment accordingly.

I think, therefore, the order for the injunction should be discharged. I confine myself to discharging the injunction. After the demurrer has been argued, the parties may again apply to the Court if they think proper.

1844.

HINTON v. LEWIS.

July 31.

IN the month of *July* 1843, no replication having then been filed, the Defendant moved to dismiss the bill for want of prosecution; whereupon the usual order was made that the plaintiff should file a replication, serve a *subpœna* to rejoin, and obtain and serve an order for a commission to examine witnesses, if he required such commission, within three weeks from that time, and give rules to produce witnesses, and pass publication in *Hilary* term then next &c., or, in default thereof, the bill should stand dismissed with costs. In pursuance of that order, the Plaintiff duly filed a replication, and served a *subpœna* to rejoin, and also obtained and served an order for a commission. Afterwards, however, finding that he did not want the commission, he let it drop, and no further step was taken in the cause until the 3d of *February* 1844, when the Defendant moved again before the Vice-Chancellor of *England* to dismiss the bill. But his Honour refused the motion.

Where a Plaintiff obtains an order for a commission to examine witnesses, and serves it upon the Defendant, his subsequent abandonment of such order will not withdraw the case from the operation of the 17th amended Order of 1831.

The motion was now renewed by way of appeal before the Lord Chancellor, the Plaintiff having in the meantime, but after he had been served with notice of the appeal motion, given rules to produce witnesses and pass publication.

Mr. *James Parker*, for the motion, stated that the ground of the Vice-Chancellor's judgment was, that, notwithstanding the Plaintiff had obtained and served an order for a commission, yet, as he had afterwards found that he did not require one, and had accordingly dropped it, the case was not within the 16th and 17th amended General Orders of *November* 1831, which had been held only to apply to cases where the Plaintiff required

1844.

HINTON

v.

LEWIS.

required a commission; *Smith v. Oliver*. (a) The Master of the Rolls, however, had held in *Rayson v. Lees* (b), that, by obtaining and serving an order for a commission, the Plaintiff brought his case within those Orders, and that having once done so, he could not afterwards withdraw himself from their operation. The question was, which of these two views of the practice was the correct one.

Mr. *Anderdon* and Mr. *Parsons* *contra*.

Mr. *James Parker*, in reply.

The LORD CHANCELLOR.

In *Smith v. Oliver*, the party had not acted at all under the 17th Order: here he has taken two steps under it, by obtaining and serving an order for a commission: and having once commenced proceedings under the Order, I think he was bound to continue them so far as the circumstances required. He says he afterwards found it unnecessary to prosecute the commission: but that did not dispense with his taking the other steps required by his undertaking; and not having given rules in *Hilary* term when he ought to have done, he was in default when the motion was made before the Vice-Chancellor, and the bill ought therefore to have been dismissed, unless there was some reason for making a different order.

Mr. *Anderdon* then claimed the indulgence of the Court on the ground of the unsettled state of the practice; and after some discussion as to the terms on which the indulgence should be granted, it was ultimately ordered that the Plaintiff should pay the costs of this motion, and that publication should stand enlarged o the first day of next *Hilary* term.

(a) 5 *Myl. & Cr.* 165.

(b) 1 *Keen*, 14.

1844.

In the Matter of JONES, a Lunatic.

Dec. 13.

THIS was a petition by the committee of the lunatic, praying that, under the circumstances stated in the petition, the lunatic might be permitted to reside in *Scotland*.

Leave given for a lunatic, under particular circumstances, to reside in *Scotland*, his committee, who resided in *England*, undertaking to bring him within the jurisdiction whenever it should be required.

It appeared, upon affidavit, that the lunatic, who had for some time past been residing in *Scotland* without the sanction of the Lord Chancellor, had originally gone thither with his mother, who died at *Edinburgh* in *November* 1843; after which the lunatic having become violent and intractable, it had been thought advisable to place him in a lunatic establishment at *Glasgow*, where he had ever since remained: that, since he had been at *Glasgow*, his health and mental condition had visibly improved, and that he was much soothed by the frequent visits of his brothers and sisters, all of whom resided either at *Edinburgh* or *Glasgow*, while, in *England*, he had no relations nearer than uncles and aunts, with whom he had very little acquaintance; and that his committee, who was one of those uncles, and who resided in *England*, would be unable, from the state of his own health, to be much with him.

The LORD CHANCELLOR, after observing that he was not aware of any precedent for such an order as was prayed, said that, under the peculiar circumstances of this case as disclosed by the affidavit, he was disposed to make it, provided the committee would give security for bringing the lunatic within the jurisdiction when he should be required so to do.

1843.

 In the Matter
 of JONES.

Mr. *Wakefield*, who appeared in support of the petition, having intimated that the committee was willing to comply with that condition, the order was made.

1843.
 March 23.

ROUSE v. JONES.

1844.
 Nov. 9.

After the usual decree has been obtained in a creditors' suit against the real and personal representatives of an intestate, this Court will restrain all further proceedings in an action by a bond creditor of the intestate against the heir, although the heir may have pleaded *riens per descent* and issue may have been joined on such plea; and as the heir will be ordered to pay to the creditor his costs of the action up to the time when he had first notice of the decree, any delay in applying for the injunction will, in most cases, resolve itself into a question of costs.

THIS was a creditors' suit against the real and personal representatives of an intestate for payment of his debts. It appeared from the answer that the real estate was subject to certain mortgages, but the mortgagees were not made parties to the bill. After the usual decree had been obtained, the Defendant, the heir, moved before the Vice Chancellor of *England* for an injunction to restrain further proceedings in an action which had been brought against him by a bond creditor of the intestate. The application was resisted on the ground, amongst others, that, before the decree was made, issue had been joined in the action on a plea of *riens per descent præter*, &c., and that if such plea should be falsified the Plaintiff would be entitled to judgment against the heir *de bonis propriis*. The Vice Chancellor having refused the motion with costs, it was now renewed, by way of appeal, before the Lord Chancellor.

Mr. *Wakefield* and Mr. *Faber* for the motion.

Mr. *Bethell* and Mr. *Goldsmid*, *contra*.

Besides

Besides the cases referred to in the judgment, *Price v. Evans* (a), and *Clarke v. Lord Ormonde* (b), were cited. (c)

1843.

ROUSE

v.

JONES.

The LORD CHANCELLOR.

1844.

Nov. 9.

In this case *Owen Williams* brought an action against *Robert Scott Herbert Jones*, as the heir of *Humphrey Herbert Jones*, on a bond executed by him in 1821. The Defendant pleaded that he had no lands by descent from *H. H. Jones* except those stated in the plea. The Plaintiff replied that the Defendant had other lands by descent from *H. H. Jones*, upon which issue was joined. Some time afterwards a bill was filed, and a decree obtained, at the suit of the present Plaintiff, on behalf of himself and the other creditors of *H. H. Jones*, for the administration of his estate. This decree was obtained on the 2nd of *March* 1843. Notice of trial in the action had been previously given, viz. on the 21st of *February*, for the assizes at *Beaumaris*, which were fixed on the 21st of *March*. On the day on which the decree was obtained, notice of it was served on the attornies of *Owen Williams*, requiring them to desist from proceeding further in the action. They refused to comply; and on the 10th of *March* they were served with the decree, and, on the same day, with a notice of motion to restrain the Plaintiff from proceeding to trial and execution. The motion was made before the Vice Chancellor of *England*, who refused the injunction. The object of the present application is to discharge the Vice Chancellor's order and to stay the further proceedings at law.

It

(a) 4 *Sim.* 514.

(b) *Jac.* 103., see p. 122.

(c) See *C. P. Cooper's Reports*, p. 132. note, where the

cases on this subject are collected; and see also *Kent v. Pickering*, 5 *Sim.* 569.; *Burles v. Popplewell*, 10 *Sim.* 383.

1844.

ROUSE
v.
JONES.

It was insisted, in opposition to this motion, that the application to the Vice Chancellor came too late, on the eve of the trial. It is material, therefore, to consider the dates. Notice of the decree was served on the 2nd of *March*; the trial could not take place at the earliest before the 21st; and as the Plaintiff's attornies refused to stay the proceedings in the action, and which refusal was communicated to the Defendant's on the 6th, they on the 10th served the notice of motion for an injunction. The Plaintiff's attornies had thus notice of the decree nearly three weeks before the commission day; and, as they would be entitled to their costs up to the day of the notice, including the costs of preparing for trial, if any had been incurred, there appears to me to have been no sufficient reason for refusing the motion on the ground of the lateness of the application. In *Lord v. Wormleighton (a)*, notice of trial was given on the 15th of *July*; the decree was obtained on the 21st, and notice of it was served on the same day. The trial took place a few days afterwards. The motion was not made till after the trial. The Vice Chancellor Sir *J. Leach* enjoined the party from proceeding at law, giving the costs incurred up to the notice of the decree. The Lord Chancellor, upon appeal, added the costs of the trial. Any delay in the application before judgment will in most cases properly resolve itself into a mere question of costs.

It was further insisted that, as the Defendant in the action had pleaded that he had no lands by descent except what he had stated in his plea, upon which issue was taken, the Plaintiff had a right to proceed to trial to falsify this plea, which, if it were found by the jury to be false, would entitle him to a personal remedy against the Defendant; and *Brook v. Skinner (b)* was cited.

It

(a) 1 *Jac.* 148.(b) 2 *Meri.* 481. n.

It is proper to consider, with reference to this argument, the ultimate effect of such a verdict. Upon the trial of the issue, if the jury should find that the Defendant had lands by descent, other than those mentioned in his plea, it would be their duty to assess the value of such lands, and for their value thus found the Plaintiff would be entitled to execution against the Defendant as for his own debt. But upon the amount being levied or paid the lands in respect of which the levy or payment was made, would become the property of the Defendant. In *Buckley v. Nightingale* (a), the Court, in giving judgment, say that "the heir is liable no further than to the value of the lands descended, and as soon as he has paid his ancestor's debts to the value of the land, he shall hold the land discharged, otherwise he might be chargeable *ad infinitum*." It follows therefore that, if a verdict for the Plaintiff should be obtained on this plea, and judgment be entered up and execution issue thereon, the debt due to the Plaintiff would, in effect, be satisfied out of the real assets of the deceased. These assets, including what were admitted by the plea and what were denied, would thus to that extent be withdrawn from the fund which ought to be applied for the general benefit of the creditors under the decree of this Court, and this too in a case where the decree was prior in point of date to the judgment; *Lee v. Park*. (b)

Some objections were made to the form of the decree, as not sufficiently comprehensive. I find, upon examination and inquiry, that it is the usual and proper decree in cases of this nature. It directs the Master to make enquiry as to the real estate of the testator, and the incumbrances thereon, and what is due in respect of such incumbrances. This is all that is necessary in the first instance.

It

(a) 1 *Strange*, 665.

(b) 1 *Kecn*, 714.

1844.

ROUSE
v.
JONES.

1844.

ROUSE

v.

JONES.

It was suggested that the mortgagees should have been parties, and the accounts taken against them. It is not necessary that they should be parties in cases of this nature, nor is it usual to make them so. They may go into the Master's office, if they think proper, or, if the estate is ordered to be sold on further directions, it may be sold subject to the mortgages. I am of opinion, therefore, upon this view of the case, that the injunction ought to have been granted. The order, therefore, must be discharged. I understand the trial has already taken place: the Plaintiff at law must be restrained, therefore, from proceeding further in the action upon being paid his costs incurred up to the time when his attornies were served with notice of the decree.

See the next case.

1843.

April 2.

1844.

Nov. 16.

VERNON v. THELLUSSON.

After the usual decree has been obtained in a creditor's suit, this Court will stay all further proceedings in an action by a creditor against the executor, upon payment to the creditor of his costs of the action up to the time when he had first notice of the decree, although the executor may have pleaded *plene administravit*, and issue may have been joined on such plea.

A JUDGMENT creditor of a testator having issued a writ of *scire facias* against the executors, this bill was filed against them by another creditor on behalf of himself and all the rest, for payment of the testator's debts in a course of administration: and the usual decree having been speedily obtained, notice of it was immediately served on the Plaintiff at law. During the ensuing fortnight the sittings of this Court were suspended; but the executors having, in the meantime, been called upon to plead, put in several pleas, and amongst others one of *plene administraverunt*, upon which issue was joined, and notice

tice of trial was served upon the executors. On the morning of the day for which that notice was given, being the first day of the resumed sittings of this Court, the executors moved, before the Vice Chancellor of *England*, for an injunction to restrain further proceedings in the *sci. fu.*, which was granted upon the terms of paying to the Plaintiff-at-law his costs up to the time when he had notice of the decree.

1843.

 VERNON
 v.
 THRELLCASSON.

The Plaintiff-at-law now moved, by way of appeal before the Lord Chancellor, to discharge that order.

Mr. *Bethell* and Mr. *Campbell*, in support of the motion, took three points. 1st. The delay on the part of the executors, in not applying for the injunction until the very day appointed for the trial. 2dly. The insufficiency of their affidavit relative to the state of the assets and their dealings with the estate; *Paxton v. Douglas*. (a) 3dly, and principally, that the executors, by putting in a plea of *plene administraverunt*, which their own affidavit shewed to be false, had entitled the Plaintiff-at-law to a judgment against them *de bonis testatoris, et si non de bonis propriis*; and that, the object of the injunction being the protection of the estate, and not of the executors personally, (*Kent v. Pickering* (b),) the injunction, if granted at all, ought to have been confined to restraining execution against the assets of the testator, leaving to the Plaintiff his personal remedy against the executors, in the event of the plea being falsified; *Terwest v. Featherby* (c); *Brook v. Skinner* (d); *Drewry v. Thacker* (e); *Lee v. Park*. (g)

Mr.

- (a) 8 *Ves.* 520.
- (b) 5 *Sim.* 569.
- (c) 2 *Meriv.* 480.

- (d) *Id.* 481. n.
- (e) 3 *Swanst.* 529.
- (g) 1 *Keen*, 714.

1844.

 VERNON
 v.
 TRELLEUSON.

Mr. *Stuart* and Mr. *Dean*, *contra*, referred to *Fielden v. Fielden* (a), *Lord v. Wormleighton* (b), *Williams on Executors*, p. 1179. *et seq.*

1844.
 Nov. 16.

The LORD CHANCELLOR.

In this case a judgment had been entered up in the Court of Exchequer against the testator for 4000*l.* on the 16th of *December* 1842. He died in the month of *February* following, and a *scire facias* was, on the 19th of *April* 1843, sued out against the executors. They appeared to the writ, and on the 2d of *May* a declaration was delivered. On the following day the bill in this suit was filed by the Plaintiff on behalf of himself and the other creditors of the testator; and notice of it was on the same day served upon the attorney for the plaintiff in the *scire facias*. There was some irregularity in the declaration, which rendered an amendment necessary. The Defendants were allowed two days time to plead after the amendment. They accordingly, within the two days, viz. on the 13th, delivered a plea of *plene administravit* to the amended declaration. Previously to this, viz. on the 11th of *May*, a decree had been obtained, and when the plea was delivered notice of the decree was at the same time served. On the 17th issue was joined, and notice of trial given for the first sittings in *Trinity* term, which were fixed for the 26th. On the 23d, application was made for leave to give a notice of motion for an injunction. The motion was heard on the 26th.

It does not appear to me, upon considering these dates, that, even supposing such a question to be material

(a) 1 *S. & S.* 255.

(b) *Jac.* 148.

rial in the present case (the decree having been obtained before judgment in the action), there has been any want of due diligence on the part of the Defendants. The declaration was not delivered till the 2d; and on the following day the bill was filed, and notice of it served. Before the time for pleading was out, the decree was obtained, and notice of it served. There appears, indeed, to have been an interval of a few days between the date of the decree and the motion for the injunction; but the sitting of the Court was suspended nearly the whole of that time, *Easter* term having ended on the 11th, the day the decree was obtained.

1844.

 VERNON
 v.
 THELLUSSON.

But then it is said, as *plene administravit* has been pleaded, the Plaintiff has a right to proceed to trial to falsify that plea; and, further, that it is clear, from the affidavits filed on the part of the executors themselves, that the plea is false in fact; and *Terrewest v. Featherby* and *Brooke v. Skinner* were referred to. But these cases cannot be relied upon as authorities for the purpose for which they were cited, after the observations made respecting them by Lord *Eldon* in *Lord v. Wormleighton* (a), in which he intimates that he had a wrong notion upon the subject, when those decisions were pronounced.

It is clear that, upon the plea of *plene administravit*, if the verdict be found for the Plaintiff, the judgment would be *de bonis testatoris* only, and for a sum not exceeding the value of the goods found by the jury to have come to the hands of the executors. The principle, therefore, upon which those decisions proceeded, entirely fails, it having been assumed incorrectly, and as the ground of decision, that the judgment would in such case

(a) *Jac.* 150.

1844.

 VERNON
 v.
 THELLUSSON.

case be *de bonis testatoris, et si non de bonis propriis*. It is true that if the Plaintiff cannot find goods of the testator's to the amount returned by the jury, the executor will, upon a *scire facias* suggesting a *devastavit*, be personally liable for the deficiency ; but, upon the amount being satisfied out of the property of the executor, he would become entitled to the assets for which he had thus paid an equivalent. For where a claim is made against an executor, if it is shewn that he has goods in his hands which were the testator's, he may prove that he has paid to that value with his own money, and this will be a sufficient discharge. (a)

The result therefore is, that if the action should be allowed to proceed to judgment and execution on this plea, and the jury should falsify the plea, and find that there are assets, those assets would be withdrawn from the general fund, which ought to be distributed in this Court for the common benefit of all the creditors. For this consequence would follow whether the assets were discovered and taken in execution by the sheriff on the judgment, or, upon the return of *nulla bona*, were ultimately, upon a *scire facias*, to be satisfied out of the goods of the Defendant. I concur, therefore, in the decision in *Lord v. Wormleighton*.

But, independently of the general question, it is to be observed that the plea was not filed in this case till after the decree was obtained and notice of it served ; and it is obvious that it was filed merely for the purpose of enabling the executors to apply by motion to this Court to stay the proceedings. If the executors had suffered judgment by default, which they might have done, execution would probably have issued before the motion could

(a) 1 *Inst.* 283. a.

could have been made. This therefore is not a sufficient ground for preventing the interference of the Court. *Dyer v. Kearsley* (a), *Fielden v. Fielden*. (b) Then as to the affidavits, the Court in these cases requires to be informed of the state of the assets before it will stay the proceedings at law; *Paxton v. Douglas*. (c) I have read the affidavits, and, adverting to the nature and state of the property as therein described, I think the account given of it on the part of the executors is satisfactory, and all that could at that period be reasonably required.

Motion refused with costs.

(a) 2 *Meriv.* 482. n.

(c) 8 *Ves.* 521.

(b) 1 *Sim. & Stu.* 225.

1844.

VERNON
v.
THELLUSSON.

STEELE v. STEWART.

THE Plaintiff was an underwriter of a policy of insurance effected by the Defendant on a ship which was lost on her passage from *Calcutta* to *England*. The Defendant having brought an action on the policy, the Plaintiff pleaded that the ship was not sea-worthy; and, in support of that defence, he filed this bill for discovery, a foreign commission, and an injunction. Among the documents admitted by the answer to be in the defendant's possession relating to the matters in question, were seven letters, as to which the first answer stated, in substance:—That a person named *Warren*, who was the master of the ship, was sent out to *India* by the Defendant, at the suggestion of his solicitors, for the express purpose of collecting evidence on his behalf in support of the action, and that he was engaged there for two years and upwards in collecting such evidence; and

1843.
Nov. 23.
Dec. 5.

1844.
Nov. 14.

Where the circumstances of the case render it necessary for a party or his solicitor to employ an agent to collect evidence in support of legal proceedings, the communications of such agent to his principal relating to such evidence are privileged.

1843.
STEELE
v.
STEWART.

and that as many of the witnesses were natives of *India*, and had been employed by *Warren* in the repair of the ship, it would have been impossible without his presence and assistance to have obtained the evidence necessary to maintain the action; and that the letters in question were written by *Warren*, while he was absent on that mission, partly to the Defendant, and partly to his solicitors; and the Defendant submitted that the letters were confidential, and that he was not bound to produce them. In a further answer he stated that the letters in question were written by the master to the Defendant and his solicitors in this country, while he was acting by the direction and as the agent of the Defendant and his solicitors in procuring evidence in support of the action, and that the contents of the letters related to and concerned such evidence.

A motion for the production of these letters, having been refused by the Vice Chancellor of *England*, was now renewed, by way of appeal, before the Lord Chancellor.

Mr. *Bethell* and Mr. *Hetherington*, in support of the motion, stated that the Vice Chancellor, when he made the order, acknowledged that, in protecting from production communications between the party or his solicitor and an unprofessional agent, he was extending the privilege beyond the limits to which it had hitherto been carried; and they contended that such extension of it was not authorised by the principle of public policy on which it was founded. They also commented on the statements in the answers as being inconsistent with each other, insisting that, from those statements, it was uncertain whether *Warren* was the agent of the Defendant or of his solicitors, and consequently whether, in making the communications in question, he had in fact acted as agent for either of them.

Mr.

Mr. Romilly and Mr. Lewis, *contra*.

1843.

The following cases were cited: *Preston v. Carr* (a), *Curling v. Perring* (b), *Bunbury v. Bunbury* (c), *Hughes v. Biddulph* (d), *Taylor v. Forster* (e), *Combe v. Corporation of London* (g), *Llewellyn v. Badeley* (h).

STEEL
v.
STEWART.

The LORD CHANCELLOR.

1844.
Nov. 14.

In this case an action had been brought in the Common Pleas by the Defendant against the Plaintiff *Steele* on a policy of insurance effected on the ship *Sherburne* for twelve months, at and from *Calcutta*, &c. The defence relied upon was, that the ship was not seaworthy. The present bill was filed for discovery, a commission, and an injunction. The Plaintiff moved for the production of the letters, papers, &c. admitted by the Defendant's answer, and the schedules thereto to be in his possession or power. The question is confined to certain letters, the dates of which are set forth in the further answer of the Defendant. He contends that he is not bound to produce these letters.

The answer admits that *Warren*, the master of the ship, was sent out to *India* by the Defendant at the suggestion of the Defendant's solicitors, for the express purpose of collecting evidence on behalf of the Defendant in support of the action, and that he was engaged there for two years and upwards, in collecting such evidence, and that as many of the witnesses were natives of *India*, and had been employed by *Warren* in the repair of the ship,

(a) 1 *Y. & J.* 175.

(e) 2 *Car. & Payne*, 195.

(b) 2 *My. & K.* 380.

(g) 1 *Y. & C. n. s.* 150.

(c) 2 *Benn.* 173.

(h) 1 *Hare*, 527.


(d) 4 *Russ.* 190.

1844.
STEELE
v.
STEWART.

ship, it would have been impossible without his presence and assistance, to have obtained the evidence necessary to maintain the action. In a subsequent part of the answer, the Defendant states, "that during the period the master was absent for the purpose of obtaining evidence in support of the action, he wrote and sent to the Defendant, and also to his solicitors, divers letters, on the subject of such evidence, and the same were duly received by him, the Defendant, and his solicitors, and are in the possession of the Defendant's solicitors, but the Defendant submits that such letters are confidential communications, and that he is not bound to produce and ought to be protected from producing the same, and that he is not bound to answer whether such letters or any of them relate, or in some or what manner refer, to the state of repair, or otherwise to matters in the said bill inquired after." The Defendant, in his further answer, states that "the letters in question were written by the master to the Defendant and his solicitors in this country whilst he was in *Calcutta*, acting by the direction and as the agent of the Defendant's said solicitors in procuring evidence in support of the action in the amended bill mentioned, and that the contents of the letters relate to and concern such evidence." It does not appear to me that there is any inconsistency in these statements. He might have been sent out by the Defendant for the purpose of collecting evidence on behalf of the Defendant, at the suggestion and by the advice of the Defendant's solicitors, and might, in collecting such evidence, have acted under the direction and as the agent of the solicitors. The single question therefore is whether letters, written under these circumstances, are privileged communications.

First, as to the letters written by the solicitor's agent to the Defendant. When a solicitor is employed to collect

collect evidence for his client in a pending suit, it is clear that his communications with his client respecting such evidence are privileged. But a solicitor cannot always act in his own person in the collection of evidence. Distance and other circumstances may render this impossible. Such was the case here: the witnesses were many of them native *Indians*, and a voyage to *India* was required for that purpose. It was necessary, therefore, that the solicitor should employ an agent, and whether that agent was a clerk to the solicitor or any other person appears to me wholly immaterial. In performing this duty he represented the solicitor, and his communications to the client, on the subject of the evidence, were the communications of the solicitor, falling within the same principle and entitled to and requiring the same protection.

1844.

 STEELE
 v.
 STEWART.

As to the letters addressed to the solicitors by their agent, they would also be privileged, being written in pursuance of inquiries instituted by, or under the direction of, the solicitors, as to evidence in support of the action.

I agree, therefore, with the Vice Chancellor, in thinking that these letters ought not to be produced. I do not, however, concur with that learned Judge, in considering this an extension of an admitted principle. I consider the case as coming within the same principle on which the communication of the solicitor himself would, under similar circumstances, be privileged.

See the next case.

1844.

Jan. 31.

Feb. 24.

Nov. 28.

Letters written or cases stated for the opinion of counsel by a party or his solicitor, with a view to a suit then in contemplation, are privileged from production, not only in that suit but in any subsequent litigation with third parties respecting the same subject matter, and involving the question to which such letters and cases relate.

HOLMES v. BADDELEY and Others.


BY the settlement made on the marriage of *Roger Holmes* and *Susannah Abney* in the year 1772, a real estate, called *Mill Farm*, the property of *Susannah Abney*, was conveyed to the use of *Roger Holmes* for his life, with remainder to *Susannah Abney* for her life, with remainder to the use of the first and other sons of the marriage in tail general, with remainder to the use of the daughters of the marriage as tenants in common in tail general, and, in default of such issue, to the use of *Roger Holmes* in fee.

The only issue of the marriage were two daughters, *Susannah* and *Ann*.

Roger Holmes, by his will, dated the 8th of *October* 1778, devised all his real estates to trustees in trust, in case two or more of his children by his marriage with his then wife should live to attain the respective ages of twenty-one years, for such children, their heirs and assigns, as tenants in common; but in case there should be no such child who should live to attain that age, and from and after default of such issue, he devised his estate, called *Mill Farm*, and all his estate, right, title, and interest therein, whether in possession, reversion, remainder, or expectancy, to the only proper use and behoof of his said wife, her heirs and assigns.

Roger Holmes died within a month after the date of his will, leaving his widow, *Susannah Holmes* the elder, and his two daughters, *Susannah Holmes* the younger and

and *Ann Holmes* surviving him. The widow died in the year 1800. Both the daughters attained twenty-one, and died intestate and unmarried, and without having barred the estate tail under the settlement. On the death of *Susannah*, the survivor of them, in the month of *June* 1838, three parties laid claim to the estate. The testator, *Roger Holmes*, had a brother *Edward Holmes*, who had a son *Edward Holmes* the younger, and several daughters. The Plaintiff in this suit claimed as the only son and heir of *Edward Holmes* the younger. The Defendants claimed under the daughters of *Edward Holmes* the elder, insisting that the Plaintiff was an illegitimate child. The third claim was made by one *Ann Heming*, as heiress-at-law of *Susannah Holmes* the younger, *ex parte maternâ*.

1844.

 HOLMES
 v.
 BADDELEY.

In the month of *December* 1839, a deed of compromise was executed between the Plaintiff and the Defendants in this suit, under which the estate was to be sold, and the proceeds to be divided between them in certain proportions.

The bill alleged that the Plaintiff had been induced to accede to the compromise by fraud, and it prayed that the Defendants, who were alleged to be in possession of the estates, might deliver them up to the Plaintiff.


The Defendant *Baddeley* and wife by their answer, after referring to the claim of *Ann Heming*, stated that, after the execution of the deed of compromise, and before the Plaintiff had disputed its validity, the Defendants had applied to the heir of the surviving trustee of *Roger Holmes's* will, in whom the legal estate of the property was vested, for a conveyance of such estate;

1844.
HOLMES
v.
BADDELEY.

but that in consequence of *Ann Heming* still persisting in her claim, the application was refused, and that afterwards the Plaintiff, in collusion with *Ann Heming*, obtained an assignment of the legal estate to certain persons as trustees for them, on the faith of a fraudulent representation that the Defendants had abandoned their claim; and that by means of that estate they had got into possession of the property; and that the Defendants had, since the institution of this suit, filed a cross bill against the devisee of *Ann Heming* (who was dead), and against the Plaintiff and the other Defendants in this suit, praying that the heirs, *ex parte paternâ*, of *Susannah Holmes* the younger might be declared entitled to the estate, and that the same might be conveyed by all proper parties to the trustees of the deed of compromise.

In answer to the usual charge as to documents, &c. they stated that they had in their possession certain letters, and copies of letters, which had passed, since the death of *Susannah Holmes*, between their solicitors as such, and various persons, and also two cases on behalf of the Defendants, with counsel's opinion thereon; which cases were laid before counsel, and all of which letters were written and sent after the Defendants were aware that a claim to the estate, adverse to their title, was about to be made on the part of *Ann Heming* as heir *ex parte maternâ*, and in contemplation of legal proceedings to enforce their title, and the greater number thereof after the said claim had actually been made on the part of *Ann Heming*, and with reference to such claim, and to the right and title of the Defendants in issue in this cause and in the cross cause, and wholly independent of the compromise by the Plaintiff's bill sought to be set aside, and without any reference thereto. And they submitted that the said cases, opinions,

opinions, and letters, were privileged communications, which they were not bound to produce.

1844.

 HOLMES
 v.
 BADDELEY.

The Master of the Rolls having ordered those letters and cases to be produced, the Defendant *Baddeley* and his wife moved before the Lord Chancellor that that order might be discharged.

Mr. *Bethell* and Mr. *G. Russell* appeared in support of the motion.

Mr. *Bird*, *contra*.

The following cases were cited and commented upon : —

Curling v. Perring (a), *Preston v. Carr* (b), *Whitbread v. Gurney* (c), *Greenough v. Gaskell* (d), *Vent v. Pacey* (e), *Bolton v. Corporation of Liverpool* (g), *Hughes v. Biddulph* (h), *Herring v. Clobery* (i), *Jones v. Pugh* (k), *Combe v. The Corporation of London* (l), *Greenlaw v. King* (m), *Knight v. The Marquis of Waterford*. (n)

The LORD CHANCELLOR.

Nov. 28.

In this case the Plaintiff claims an estate as heir-at-law to *Susannah Holmes*, and he seeks to set aside a deed by which he had compromised this claim, as having been fraudulently obtained. The Defendants deny the fraud, and

(a) 2 *My. & K.* 380.

(b) 1 *Y. & J.* 175.

(c) *Younge*, 541.

(d) 1 *My. & K.* 98.

(e) 4 *Russ.* 193.

(g) 3 *Sim.* 467 ; 1 *My. & K.* 88.

(h) 4 *Russ.* 190.


(i) *Phill.* 91.

(k) *Id.* 96.

(l) 1 *Y. & Coll. C. C.* 631.

(m) 1 *Beav.* 144.

(n) 2 *Y. & Coll.* 22.

1844.

 HOLMES
 v.
 BADDELEY.


and dispute the Plaintiff's legitimacy. They also claim as heirs-at-law of *Susannah Holmes*. Soon after *Susannah Holmes*' death a right to the estate was advanced by *Ann Heming* : she claimed to be the heir-at-law *ex parte maternâ* of *Susannah Holmes* ; and her claim to the estate was founded upon the terms of the will of *Roger Holmes*, the father of *Susannah*.

Cases were laid before counsel by the Defendants, and opinions obtained upon the question, and several letters passed between the Defendants' solicitors and different persons respecting the Defendants' right to the property. These opinions were obtained, and this correspondence carried on, in contemplation of legal proceedings against *Ann Heming*. The question is whether they ought to be produced in this suit.

[His Lordship then read the passage of the answer, and proceeded.]

First, then, as to the cases and opinions : it is clear that in the contemplated suit between the Defendants and *Ann Heming* respecting this property, the cases and opinions would have been privileged, and the Defendants would not have been obliged to produce them. The principle upon which this rule is established is that communications between a party and his professional advisers, with a view to legal proceedings, should be unfettered ; that they should not be restrained by any apprehension of such communications being afterwards divulged and made use of to his prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party or parties. In the case of *Knight v. The Marquis of*


of *Waterford*, which was a suit for tithes, Lord *Abinger* refused to order the production of old briefs prepared in a suit between a former rector and the party under whom the Defendant claimed: and, on a subsequent motion in the same cause, for the production of letters stated to have passed between parties under whom the Defendant claimed and their solicitors, on the subject of the right to the tithes in question, he observed that he did not think it material whether such communications related to the cause in progress or to matters which took place on former occasions. (a) The necessary confidence will be destroyed if it be known that the communication can be revealed at any time. In *Combe v. The Corporation of London*, the Vice-Chancellor *Knight Bruce*, in refusing to order the production of cases and opinions which had been prepared and taken in contemplation of litigation upon former occasions with other parties, observed that, in his judgment, it was not material to the question that the litigations to which they related were litigations with other parties than the Plaintiffs in the then present cross bill. (b)

1844.

 HOLMES
 v.
 BADDELEY.

In those opinions I concur, and upon the principle to which I have already referred as the admitted ground upon which the privilege is allowed. The cases are stated to have been prepared, and the opinions taken, “after the Defendants were aware that a claim, adverse to their title, was about to be made on the part of the heir *ex parte maternâ*, and in contemplation of legal proceedings being taken by the Defendants to enforce their title, and occasioned by and with reference to the right and title of the Defendants in issue in the present cause and in the cross cause.” In *Bolton v. The Corporation*

(a) 2 Y. & Coll. 38.


(b) 1 Y. & Coll. C. C. 648.

1844.

 HOLMES
 v.
 BADDELEY.

poration of Liverpool, the cases and opinions which were ordered to be produced were not stated in the answer (according to Mr. *Simon's* Report) to have been prepared and taken in contemplation of any legal proceedings by or against the corporation. There are undoubtedly some expressions attributed to the Vice-Chancellor in that case, and also to the Lord Chancellor, which, literally taken, might lead to the conclusion that they considered the privilege to be confined to the particular suit which was expected or depending when the opinions were taken. But no such question was, with reference to these cases and opinions (the cases and opinions ordered to be produced), sufficiently raised by the answer, as stated in the report, and the objection to produce them was rested entirely on other grounds. In the case of *Hughes v. Biddulph* it was decided that communications between the Defendant and his solicitor, either during a cause, or with reference to it, ought to be protected; that was all which was necessary to determine for the purpose of the motion then before the Court.

But it is said, the subject in controversy with *Ann Heming*, though it related to the same property, was not the same as in the present suit. Even supposing this to be a material distinction, it is sufficient, I think, to observe that the Defendants in their answer state "that the opinions were taken in contemplation of legal proceedings to enforce their title:" they must, therefore, have not only shewn that the heir *ex parte paternâ* had the right, but that they filled that character — one of the points in controversy in the present suit. The answer further states that the cases and opinions had reference to the title of the Defendants "at issue in the present cause." In the cross cause, to which the devisee under the will of *Ann Heming*, is a party, the
 Plaintiffs

Plaintiffs pray, among other things, a declaration that, on the death of *Susannah Holmes*, the Plaintiffs and the other co-heirs became absolutely entitled to the estates in question, and also a declaration in substance that, by the will of *Roger Holmes*, the estates descended to the heirs, *ex parte paternâ*, of *Susannah Holmes*. No answer had been filed in that cause when the present motion was made. The very question in dispute with *Ann Heming* may be raised in that cause; and if the cases and opinions are produced in the original cause they may disclose circumstances by which the Defendants in this cause may be prejudiced in the cross cause. I think the cases and opinions, therefore, ought not to be produced. No attempt was made at the bar to distinguish the correspondence from the cases and opinions. I think it falls within the same principle, and that it ought not to be produced; *Curling v. Perring*. (a)

1844.

 HOLMES
 v.
 BADDELEY.

(a) 2 M. & K. 380.

1844.

1845.
 May 11.
 June 15. 28.
 1844.
 Nov. 11.

**SHEFFIELD Canal Company v. SHEFFIELD and
 ROTHERAM Railway Company.**

Under the usual order for the production of books, &c., with liberty to seal up on affidavit such parts as did not relate to the matters in question, the Defendants had produced a book with certain pages sealed up, and had made the required affidavit. The Plaintiffs afterwards on an affidavit of facts leading strongly to the inference that one of the

IN this suit, which was instituted for the specific performance of an agreement, the principal question was whether a proposal which had been made by the solicitor of the Defendants to the solicitor of the Plaintiffs, had been absolutely rejected at a certain meeting, held on the 26th of *June* 1836, or whether it had been left open for further consideration. At the hearing the Court, upon the evidence, was of the former opinion, and dismissed the bill, with costs.

By the Act of incorporation of the Railway company it was enacted, that all resolutions come to by the proprietors should be entered in a book, and that such entries should be evidence in all courts of law, of the resolutions to which they referred. The Defendants having, by their answer, admitted the possession of this book,

pages sealed up did relate to the question in dispute, moved that the Defendants might produce the book unsealed; but the motion was refused, although the Defendants declined to answer the affidavit.

The Act of incorporation of a railway company required that all resolutions come to at meetings of the proprietors should be entered in a book, and the entries were made evidence of the resolutions to which they referred. 'In a suit against the company for the specific performance of an agreement, the Defendants were ordered to produce their books, with the usual liberty to seal up such parts as did not relate to the matters in question. The books were produced accordingly, but the pages left open furnished no evidence of the agreement. After the bill had been dismissed for want of evidence, the Plaintiffs, on an affidavit of having recently discovered that the agreement had been recognised by a resolution passed at a meeting of the proprietors, applied for leave to file a supplemental bill, in the nature of a bill of review, for the purpose of making the resolution part of their case. And the Court, although of opinion that the Plaintiffs might, with due diligence, have made the discovery soon enough to have availed themselves of it in the original suit, nevertheless granted the motion, on the ground that if the Defendants had entered the resolution in their books, as they ought to have done, the consequence of any want of care and attention on the part of the Plaintiffs, or their agents, would have been obviated.

book, the Plaintiffs had obtained an order for its production, but liberty was given to the Defendants to seal up, on the oath of their law clerk, such parts as did not relate to the matters in question. The book so sealed was accordingly produced, but in the parts which were left open there was no mention of, or reference to, the agreement. The bill having been dismissed with costs at the hearing, the Plaintiffs had presented a petition of rehearing, and they now moved before the Lord Chancellor that the Defendants might be ordered to produce the book unsealed at the hearing of the appeal, and that in the meantime the plaintiffs might be allowed to inspect it.

1843.

 The
 SHEFFIELD
 Canal
 Company
 v.
 The
 SHEFFIELD
 and
 ROTHERHAM
 Railway
 Company.

The motion was founded on an affidavit, stating that the Plaintiffs had recently discovered that a resolution had been come to by the proprietors at a meeting held shortly after the proposal above mentioned had been made, in which the acceptance of that proposal was referred to and the transaction recognised as a complete agreement. The affidavit further stated that the page of the book in which the resolution would have been found, if it had been entered at all, was one of those which were sealed up.

No affidavit was filed in opposition to the motion.

Mr. *Wakefield* and Mr. *T. Parker*, in support of it, contended that in a case so pregnant with suspicion, if the Defendants would not by affidavit deny that the book contained any entry of such resolution, they ought to be ordered to produce it unsealed.

Mr. *Bethell* and Mr. *Bacon*, *contra*, refused, on the part of their clients, to make any affidavit, insisting that
 the

1843.


The
SHEFFIELD
Canal
Company
v.
The
SHEFFIELD
and
ROTHERAM
Railway
Company.

the application was without precedent; *Purcell v. Macnamara* (a) and *Bowes v. Fernie* (b).

Mr. *Wakefield* in reply.

The LORD CHANCELLOR said he would help the Plaintiffs if he could, but he did not see how, consistently with the practice, it was possible.

Motion refused, with costs.

June 15. 28.

On a subsequent day a motion was made on behalf of the Plaintiffs for leave to file a supplemental bill in the nature of a bill of review, for the purpose of making the resolution part of their case, and that the appeal then pending might stand over until such bill should be filed, and that the supplemental suit and the appeal might be heard together, and that in the meantime the taxation of costs under the decree below might be stayed.

The Defendants, on this occasion, filed affidavits for the purpose of shewing that the Plaintiffs knew, or might with due diligence have known, of the resolution, in time to have made it part of their original case; but they did not deny that their book contained an entry of the resolution.

The substance of the affidavits on both sides will appear from the Lord Chancellor's judgment.

The same counsel appeared for the different parties as before.

1844.
Nov. 11.

The LORD CHANCELLOR.

This was a motion for leave to file a supplemental bill in the nature of a bill of review.* The principal question in

(a) *Wigram on Discovery*, p. 240.

(b) 3 *M. & Cr.* 632.

in the cause was whether the proposal made by Messrs. *Badger* and *Vickers*, on the part of the Railway company in their letter of the 26th of *June* 1836, was absolutely rejected by *Benjamin Wake*, the solicitor to the Canal company, at the meeting which took place on the same day, and the treaty thereby closed; or whether it was left open in order that *B. Wake* might consult Lord *Wharncliffe* before he finally decided whether he would accede to or reject it. Upon the evidence on the hearing of the cause the Master of the Rolls was of opinion that at the meeting the proposal was definitively rejected, and the treaty closed, and, as a necessary consequence, that the Plaintiffs' solicitor could not, by afterwards declaring his acceptance of the offer, which he had previously rejected, fasten an agreement on the Defendants.

It is stated, in support of the present motion, that since the decree was pronounced, the Plaintiffs have discovered new and material evidence in support of their case, which, if produced at the hearing, would have led to a different result, and entitled them to a decree in their favour. This evidence consists of the report of the directors of the Railway company made at a general meeting of the proprietors, and of certain resolutions passed at that meeting by which the report was adopted. As the question in a great measure depended upon the statement of what passed at the meeting of the 26th of *June*, 1836, the subsequent representation of the transaction by the Defendants was undoubtedly very material. In the report they state the proposal that was made, the counter proposition of the Plaintiffs, the rejection of that proposition, a threat on the part of the Plaintiffs to oppose the bringing up of the report, and their final acceptance of the proposal made by the Defendants. It is not suggested that the treaty had been broken off, or that the acceptance came too late. On the contrary, they

1844.

 The
 SHEFFIELD
 Canal
 Company
 v.
 The
 SHEFFIELD
 and
 ROTHERHAM
 Railway
 Company.

1844.

 The
 SHEFFIELD
 Canal
 Company
 v.
 The
 SHEFFIELD
 and
 ROTHERHAM
 Railway
 Company.

they speak of the matter as an arrangement, that is, as something settled, something agreed upon, though resting, as they represent it, upon the correspondence between the solicitors. They state that it will be necessary to carry it into effect by a formal document, which imports, I think, that the matter was settled, though informally.

It is impossible to doubt that this evidence would have been very important at the hearing of the cause. Whether, taken in connection with the rest of the proofs, it would necessarily have led to a different result, I will not undertake on this motion to decide. It is sufficient to say that the introduction of it would raise a question of fact of considerable nicety for the decision of the Court, and would be sufficient ground for a supplemental bill in the nature of a bill of review to be filed, provided the Court is satisfied that the evidence has been discovered since the decree, and that there has been no want of attention or diligence on the part of the Plaintiffs or their agents. It is necessary therefore to enquire whether the Plaintiffs or their solicitors knew of the report or resolutions before the decree, and whether the omission to avail themselves of this evidence is imputable to their own inattention and neglect; for if so, they are not, according to the usual rule, entitled to the relief they seek.

It appears that some of the members of the Canal company were proprietors of shares in the railway, and were present when the report was read and the resolutions passed. This applies, among others, to *Marsh* and *Spencer*, both of whom were among the original directors of the railway by whom the report was drawn up and presented, and were also proprietors of shares in the Canal company. They therefore must have known of the report and resolutions, and *Marsh* was upon the committee

committee of management of the Canal company in 1840 while the suit was proceeding. Several of the persons who were members of the committee of management in 1839; and following years, deny all knowledge of the report and resolutions till after the judgment was delivered. No affidavit has been made by Mr. *Hugh Parker*, who appears to have continued a member of the committee for several years, and in 1836 was chairman. The reason assigned, viz. that he had removed to the neighbourhood of *Derby*, is not very satisfactory. *John Marsh*, also, who is stated to have been one of the committee of management in 1840 while the suit was in progress, does not join in the affidavit. He could not have done so, as he was one of the directors of the Railway company by whom the report was presented. The deponents say not only that they themselves were not aware, but that they believe that none of the proprietors were aware, of the report or resolution until after the judgment. This would include Mr. *Marsh*, and can only be explained upon the supposition that they were not apprised of his having been a director of the Railway company in 1836, and having concurred in presenting the report. The report and resolutions were printed in each of the three newspapers published at *Sheffield*. Some of the canal proprietors were subscribers to one of the papers—the *Isis*; and several were in the habit of attending the news-rooms in which all the *Sheffield* papers were regularly taken in. It appears, also, that the report and resolutions were printed and circulated, and a copy sent by post to each of the proprietors, several of whom, as I have already stated, were also proprietors of canal shares. It seems very improbable therefore that none of the proprietors should have known, at the time, of what had passed at the general meeting of *August* 1836, as represented in the affidavit, filed on the part of the Plaintiffs. But as the passage in question formed only a small and subordinate part of the

1844.

 The
 SHEFFIELD
 Canal
 Company
 v.
 The
 SHEFFIELD
 and
 ROTHERHAM
 Railway
 Company.

1844.


The
SHEFFIELD
Canal
Company
v.
The
SHEFFIELD
and
ROTHERAM
Railway
Company.

the report relating to a collateral matter, it is not unreasonable to suppose that it may have escaped their recollection after so considerable an interval of time.

With respect to Mr. *B. Wake*, the solicitor of the Canal company, it is proved that he saw the copy of the *Isis*, in which the report and resolutions were published; and in a conversation with Mr. *Badger*, the solicitor to the Railway company, before the suit was commenced, he is stated to have referred to those documents, and to have insisted that the statement contained in them was inaccurate. This is sworn by Mr. *Badger* in his affidavit, and is confirmed to a certain extent by Mr. *Vickers*, who says, that immediately after the conversation, *Badger* told him what had passed between him and Mr. *Wake*. Mr. *Wake* being dead, this statement does not admit of direct contradiction. But affidavits have been filed by Mr. *Wm. Wake* and his brothers, referring to the books of the deceased, which are represented to have been kept with considerable minuteness of detail, and in which no entry is to be found of any meeting with Mr. *Badger* at the time when this conversation is stated to have been held; and they say that such entry would, according to the usual course, have appeared, if the meeting had really taken place. It is also sworn that they themselves knew nothing of the report and resolutions, and that they are convinced from his whole conduct, and from all that passed between them and Mr. *B. Wake* on the subject of this cause, that he had no knowledge of them. From the contents and effect of the report, and resolutions, it is reasonable to infer, that they were not present to the mind of Mr. *B. Wake*, either when the bill was filed or in the progress of the cause; for it would be difficult in any other way to account for his not having made them a part of his case. This omission is the more remarkable, as he had referred in the bill to a report presented to the Canal company,
in

in which the agreement was stated, and had relied upon Mr. *Badger's* acquiescence in the correctness of that statement. These documents were material for the same purpose, and leading with much greater effect and more directly to the same conclusion. But, after considering these circumstances, I think, though with some hesitation, that, in the absence of any evidence to impeach the character of Mr. *Badger*, and nothing of this sort is even suggested, I ought not to allow the inference to be drawn from this evidence to outweigh the direct and positive testimony in his affidavit, confirmed as it is by the statement of his partner Mr. *Vickers*.

The manner in which after the death of *B. Wake* this evidence is said to have been discovered, is not a little singular. Some person, it is stated, left a copy of the circular at the residence of Mr. *Wake* in *Sheffield*, when that gentleman was in *London*. We are not told who this person was, nor is it stated that Mr. *Wake* does not know and cannot inform us. This is very unsatisfactory. If he really does not know, he ought to have said this in his affidavit, as a reason for not offering the testimony of this person as to the circumstances connected with the finding and production of the document.

This review of the evidence would, upon the whole, have led me to the conclusion that, according to the usual practice of the Court, the present motion ought not to be granted. But there is a circumstance in this case which during the whole discussion has pressed strongly upon my mind. It was the duty of the Defendants—a public duty prescribed by the act of parliament—to have entered the report and resolutions in the books of the company. Had they performed their duty in this respect (for I must upon the affidavits of Messrs. *Badger* and *Vickers* assume that no entry has been made), the Plaintiffs would have had the benefit of these documents,

1844.

 The
 SHEFFIELD
 Canal
 Company
 v.
 The
 SHEFFIELD
 and
 ROTHERHAM
 Railway
 Company.

1844.

The
SHEFFIELD
Canal
Company
v.

The
SHEFFIELD
and
ROTHERAM
Railway
Company.

ments, and the consequence of any want of care and attention on the part of themselves or their solicitor might have been obviated. No reason has been assigned, or excuse offered, for this omission. I think therefore, under these circumstances, I shall exercise a sound and just discretion in allowing the supplemental bill to be filed; *Wilson v. Webb.* (a)

(a) 2 Car, 4.

1845.
Nov. 22.

ATTORNEY-GENERAL v. POTTER.

On an appeal from an order allowing exceptions to a Master's report, those parties only are entitled to be heard who were heard in the Court below.

EXCEPTIONS having been taken to the Master's report by some of the Defendants who were in the same interest with the Informant, and the exceptions having been allowed by the Master of the Rolls.

On the hearing of an appeal, by the other Defendant, from that decision,

Mr. *Romilly* appeared for the Attorney-General; but the Appellant objected to his being heard, on the ground that he had not been heard at the Rolls, to which it was replied, that at the Rolls he was in the same interest with the party who was there appealing; whereas he now appeared to support the decision which was the subject of the present appeal.

The LORD CHANCELLOR held that this was to be considered as a mere rehearing of the exceptions to the Master's report, and therefore that the counsel for the Attorney-General, not having been heard below, ought not to be heard now.

Mr. *Romilly* was, accordingly, not heard.

1844.

The Corporation of GLOUCESTER v. WOOD
and Others.


Feb. 8.
March 9.
Dec. 21.

THIS was a suit for the payment of a legacy of 200,000*l.*, which was claimed by the Plaintiffs under a codicil to the will of the late *James Wood*. The Defendants were the three surviving executors of the will; and the same persons, with a fourth executor, who had died since the testator, were the residuary legatees. The amount of the legacy claimed was paid into Court at an early stage of the suit, and invested in New 3½ per cent. annuities. At the hearing of the cause before Vice-Chancellor *Wigram*, the bill was dismissed; whereupon the Plaintiffs moved, upon an affidavit of their intention to appeal to the House of Lords, that, notwithstanding the decree, no part of the stock might be transferred until the further order of the Court. Upon the hearing of that motion, the Vice-Chancellor required of the Plaintiffs, as the condition of his granting it, that they should undertake to submit to any order that the Court might thereafter make for the payment of interest and of the costs of the application, and consequent thereon, which undertaking the Plaintiffs having declined to give, the motion was refused with costs. The Plaintiffs then renewed their motion by way of appeal before the Lord Chancellor, at the same time praying that the Vice-Chancellor's order might be discharged.

Mr. *Swanston*, Mr. *Humphrey*, and Mr. *John Baily*,
for the motion.

Mr. Where, in a
suit against
executors for
the payment
of a legacy,
the amount
claimed had
been brought
into Court
and invested,
and the bill
was after-
wards dis-
missed at
the hearing,
the Court, in
granting a
motion by
the Plaintiffs
to stay the
transfer of
the fund
pending an
appeal to the
House of
Lords from
the decree,
required from
the Plaintiffs
an under-
taking to sub-
mit to any
order the
Court might
thereafter
make for pay-
ment of inte-
rest and costs,
with liberty
to the De-
fendants to
apply for a
transfer of the
fund for the
purpose of

investment on other security, but refused to require the Plaintiffs to enter into any undertaking by way of indemnity against a possible fall in the Funds: and an objection that the Plaintiffs, who were a corporation, were incapable of giving any undertaking which would be binding on the corporate property, was overruled.

1844.

 The Corporation of
 GLOUCESTER
 v.
 Wood.


Mr. *Tinney*, Mr. *Walker*, Mr. *Romilly*, Mr. *John Parker*, Mr. *Rolt*, and Mr. *Jolliffe*, for the Defendants.

In support of the motion it was urged, that the only object of the corporation was to prevent the distribution of the fraud pending the appeal, not to prevent the Defendants from investing it in any security they thought proper, provided that on taking the fund, or any part of it, out of Court for the purpose of investment, they deposited the securities in its place. That if the Defendants wished to make higher interest of the money than the funds afforded, the order now asked would not prevent them; but that to impose such a condition as that suggested by the Vice-Chancellor upon the Plaintiffs, who had no power to alter the investment of the fund, was to exact so high a price for its preservation as to render it doubtful whether the appeal would be worth prosecuting.

On the other hand, it was insisted that if either party had reason to complain of the term imposed by the Vice-Chancellor, it was the Defendants. That there was no precedent for retaining a fund in Court upon any terms whatever, at the instance of a Plaintiff, where the bill had been dismissed. But even supposing that it was competent to the Court to make such an order, so unusual an indulgence ought not to be granted without giving the Defendants a complete indemnity. The indemnity, however, which had been proposed by the Vice-Chancellor was wholly inadequate: it might be doubted whether the undertaking of a corporation was not altogether worthless, inasmuch as they could only be bound by their common seal: but at all events the indemnity ought to extend to the contingency of a possible fall in the Funds, as well as to loss of interest.

The

The LORD CHANCELLOR said that the general rule certainly was, that, where money had been paid into Court to abide the result of a suit, and a decree was afterwards made in the Defendant's favour, the Defendant was entitled to take the fund out of Court, notwithstanding the pendency of an appeal from the decree. There might, however, be special exceptions arising out of the particular circumstances of the case, and the condition of the party; and the Court would exercise its discretion upon those circumstances, either by requiring the Defendant, in taking out the fund, to give security to replace it in case the decree should be reversed; or, on the other hand, by retaining the fund in Court, with a stipulation as to the Plaintiffs' indemnity, if the decree should be affirmed. The nature of the condition to be imposed in such exceptional cases was in the discretion of the Court, and it would require a strong case to justify the court of appeal in varying the conclusion at which the Judge below had arrived in the exercise of that discretion. In the present case, however, his Lordship thought that if the application had been made to him in the first instance, and it had occurred to his mind to consider the propriety of annexing such a stipulation as that suggested by the Vice-Chancellor, he should have come to the same conclusion that his Honor had done. Unless, therefore, the Defendants were prepared to give, at least, the undertaking which the Vice-Chancellor had proposed, it would be unnecessary to consider whether such undertaking was one which, having regard to the other points raised in the argument, the Defendants were bound to accept.

1844.

 The Corporation of
 GLOUCESTER
 v.
 WOOD.

The counsel for the Plaintiffs not being authorised to give any undertaking, the motion, at their request, stood over, in order that they might consult their clients.

L. 1 2

On

1844.

The Cor-
poration of
GLOUCESTER
v.
WOOD.
March 9.

On a subsequent day,

Mr. *Swanston* said, that the Plaintiffs were willing to give an undertaking to the extent required by the Vice-Chancellor, but no further : whereupon the argument was resumed upon the two other questions.

First, whether the indemnity ought not to extend to the contingency of a fall in the Funds.

Secondly, whether any undertaking which the Plaintiffs could give, in their corporate character, would be satisfactory.

On the first point it was contended, on the part of the Defendants, that, although it was not the practice of the Court to provide against fluctuations in the Funds, where money was ordered to be paid into Court before the right to it was decided, yet, where the right, so far as this Court was concerned, had been finally adjudicated, and the application to retain the fund was made, not to the justice, but to the indulgence of the Court, a different rule ought to be applied, and the Court had in such a case no jurisdiction to retain the fund without reserving to itself the power of giving complete indemnity to the party whose rights were interfered with. If, however, indemnity was what the party was entitled to, there was much more reason for securing him against a fall in the price of stock, than for requiring an undertaking to make good the difference between the interest of the Funds and that which he might obtain by other modes of investment ; not only because the damage that he might sustain in the one case was much greater than in the other, but because the amount of such damage was in the one case easily ascertainable by the event, whereas in the other it might be extremely difficult, if not impossible, to be proved.

On

On the second point it was insisted that if any undertaking was to be given, it should be the undertaking of individual members of the corporation, as was the practice in giving security for the costs of an appeal to the House of Lords, and not the undertaking of the Plaintiffs in their corporate character; for in that character they were mere trustees, and had no power to bind the principal of the corporate property by any engagement; *Ex parte Corporation of Hythe* (a); nor even the income, except for the particular purposes specified in the Act, and it could not be said that the undertaking in question was one of those purposes. (b)

1844.
The Corporation of
GLOUCESTER
v.
WOOD.

The LORD CHANCELLOR.

Dec. 21.


I think the fund, in this case, ought not to be parted with, until the appeal has been disposed of. The Defendants are executors: if the money is paid out to them, I think they would not feel justified in distributing it till the question is decided: they would invest it. Being already invested, I think it would not be right to allow it to be taken from under the control of the Court, in order that it might be invested where it would not be under the control of the Court. But then the Defendants ought to be at liberty to apply for the payment of any part or parts of it out of Court for the purpose of investment upon other securities: and that should be made part of the order.

With respect to the additional term which was insisted upon with a view to making the Defendants liable for any loss that might arise from a fall in the Funds, I cannot accede to it. The Court has always considered the Funds as money. If the Funds fall the Defendants will

(a) 4 Y. & Coll. 55.

(b) 5 & 6 W. 4. c. 76. s. 92.

1844.


The Cor-
poration of
GLOUCESTER
v.
Wood.

will lose; if they rise they will gain: hitherto, I believe, they have rather gained.

I shall therefore discharge the order of the Vice-Chancellor, except so far as regards the costs, and shall make the order now asked, upon the terms I have mentioned, the Plaintiffs paying the costs of this application.

See the next case.

1845.
April 17.

GARCIAS v. RICARDO.

The Lord Chancellor will not, in general, stay proceedings in a cause pending an appeal from an interlocutory order, unless the appeal can be speedily heard: and therefore where the appeal is to the House of Lords, an application for that purpose will not be granted, except on condition that the House will allow the appeal to be advanced so as to be heard within a limited time.

THE Plaintiff by his bill claimed a twentieth share of the profits of a certain loan which had been negotiated by the Defendant for the government of *Spain*, and he required the Defendant to set forth the accounts connected therewith. The Defendant pleaded a judgment pronounced in his favour by a competent tribunal in *France*, where the Plaintiff had previously instituted a suit against him for the same demand. The Vice-Chancellor of *England* overruled the plea as being insufficient in point of averment, and afterwards refused a motion made by the Defendant to stay process for compelling an answer, pending an appeal from that decision to the House of Lords.

The motion was now renewed, by way of appeal, before the Lord Chancellor.

Mr. *Wakefield* and Mr. *Heathfield*, in support of it, argued that, to refuse a stay of proceedings in such a case as this, would be to deprive the Defendant of his right

right of appeal altogether: the sole object of the plea being, to relieve the Defendant from the obligation of setting out voluminous accounts relating to a great mercantile transaction, which, if the plea was a good defence, would be useless to the Plaintiff, while it might be productive of serious injury to the Defendant. They relied on *Wood v. Milner* (a), *King of Spain v. Machado* (b), *Attorney-General v. Rickards* (c).

1845.
GARCIA
v.
RICARDO.

Mr. *Bethell* and Mr. *Lewis*, *contra*, insisted that the accounts sought by the bill were not such as it could be any serious inconvenience to the Defendant to set forth, and that the hardship on the other side would be much greater if the Plaintiff should be delayed in his suit until the appeal could be heard: that applications of this kind were not to be encouraged; *Huguenin v. Bazeley* (d); and that there was no case in which proceedings had been stayed, pending an appeal, by a judge who had not pronounced the judgment appealed from.

Mr. *Wakefield*, in reply.

The LORD CHANCELLOR.

There is this peculiarity in this case, that the application is neither made to the judge who pronounced the decision appealed from, nor to the Court to which the appeal is carried. Now, looking at the present state of the business in the House of Lords, it is not likely that the appeal will be heard in the ordinary course within the next three years. If the appeal had been to me, I might have stayed the proceedings, because I should have had the remedy in my own hands, by advancing the

(a) 1 *J. & W.* 636.

(b) 4 *Russ.* 560.

(c) L. C. 31st *July* 1844.

(d) 15 *Ves.* 180.

1845.

GARCIA

v.

RICARDO.

the appeal. But in the House of Lords I have no such power.

In *The King of Spain v. Machado*, I observe that the appeal was heard in the House of Lords the same session in which the application was made here to stay the proceedings, and I have no doubt that the order was made upon the understanding that the appeal would be advanced, and that it was advanced accordingly. So, in the *Attorney-General v. Rickards*, the appeal was advanced, at my request; and it was under those circumstances that I made the order.

In the present case the accounts prayed by the bill do not appear to be complicated; and it is clear that the Defendants cannot in any event be prejudiced *in this suit* by setting them out; for if he succeeds in the appeal, they will go for nothing: and I am not satisfied that he will sustain any serious inconvenience on other grounds. I am desirous, however, of doing what was done in *The King of Spain v. Machado*, if it can be arranged so that the appeal may be heard within the next few weeks. The Defendant may apply to the House of Lords to advance the appeal; if they refuse to advance it, I shall refuse this motion. I will do what Lord Eldon did in *Wood v. Milner*: I will stay the proceedings if I can apply the remedy; not otherwise.

The House of Lords, on the application of the Defendant, allowed the appeal to be advanced, and the order for staying process in the mean time, was accordingly made.

1844.

GRIFFITH EDWARDS, and MARGARET his Wife, v. PIERCE JONES, and ELLEN his Wife, and Others. Dec. 13. 21.

THIS was an appeal motion, praying that certain documents mentioned in the schedule to the Defendant's answer might be produced, and that an order made by the Vice-Chancellor of *England*, refusing a similar motion with costs, might be discharged.

The suit was instituted for an account and payment of the Plaintiff *Margaret Griffith's* share of the residuary estate of one *John Owen*, who died intestate in the year 1835. The original bill alleged that the intestate left *Howell Powell* his nephew, and the Defendant *Ellen Jones*, his only next of kin, surviving him: that *Howell Powell* was, at the time of the testator's death, residing at *New York* in *North America*, in consequence of which *Ellen Jones* had obtained letters of administration to the estate; but that *Howell Powell* had since died intestate on the 16th of *November* 1839; and that the female Plaintiff, who was his daughter, was his personal representative. The Defendants, by their answer to that


Where a Plaintiff moves upon the answer, he is not allowed to verify, by affidavit, any allegation in the bill of a fact connected with his title, though such allegation be neither admitted nor denied by the answer.

Where the bill set forth a letter as containing an admission of the Plaintiff's title, and which it charged to have been written by the Defendant, but the De-

fendant, who was very old and nearly blind, stated that such a letter might have been written by somebody about him, but that to the best of his recollection and belief he had never written such a letter: Held, on a motion for production of documents, that the letter with an affidavit of its being in the Defendant's handwriting, could not be admitted as evidence of the Plaintiff's title for the purpose of the motion.

Where a motion for production of documents was resisted on the ground that the answer contained no admission of the Plaintiff's title, which title depended solely on whether *A. B.* had died before or after a certain day; and the answer admitted that the documents in question related to the matters mentioned in the bill, "except the question of the death of *A. B.*:" Held, that this was not a sufficiently distinct denial that they related to the Plaintiff's title, to protect them from production.


1844.


EDWARDS
v.
JONES.

bill, denied all knowledge whether *Howell Powell* was living or dead, or, if dead, whether he died before or after the intestate *John Owen*; admitting, however, that if he survived *John Owen*, he and *Ellen Jones* were the only next of kin of *John Owen* living at his death. And in the answer to the usual charge as to the possession of documents, the Defendants admitted that the documents mentioned in the schedule related to the matters mentioned in the bill, "except the question of the death of *Howell Powell*;" and they did not admit that thereby the truth of the circumstances in the bill stated, or of any of them, would appear, save as in their answer appeared.

The bill was then amended by inserting, among other things, a charge that, on the 27th of *August* 1841, one Mr. *Roberts*, the solicitor for the Plaintiffs, wrote to the Defendant a letter demanding, on behalf of his clients, an account of the estate of *John Owen*, and threatening, in case of a refusal, to file a bill; and that, in answer to that letter, the Defendant *Pierce Jones* wrote and sent to Mr. *Roberts* a letter beginning thus: "This is to inform you that I had a letter on the same subject about two years before *H. Powell*'s death from his son-in-law;" and that, at the date of that letter, the Defendants well knew that *Howell Powell* had survived the intestate, and was then dead. In the answer to the amended bill the Defendants stated that they were of very advanced age, *Pierce Jones* being eighty-two, and nearly blind, and his wife only a few years younger; and that they had no recollection of having received the letter alleged to have been written to them by Mr. *Roberts*, or any other letter; and that at the time when that letter was alleged to have been answered, the Defendant *Pierce Jones* was nearly blind; and the Defendant *Pierce Jones*, speaking to the best of his recollection and belief, denied, and the Defendant .


Defendant *Ellen Jones* believed such denial to be true; that the Defendant *P. Jones* had, in answer to the said alleged letter of Mr. *Roberts*, written or sent any such letter as in the bill alleged, or any other letter. However, they said that although they had not any recollection of any such letter having been written or sent, such a letter might have been written by some person who was in the habit of being about them. And they denied that, either at the date of the said alleged letter, or at any other time, they knew, or had reason to believe, that *H. Powell* had survived the intestate, and was then dead. With respect to the documents, they stated that the documents mentioned in the schedule to the former answer, did, "in manner appearing in the original and amended bill, and in the answer to the said original bill, and in the schedules thereto, and in this answer, exclusively relate to or evidence the title of the Defendants, unless the Plaintiffs should prove that *H. Powell* survived the intestate, and that the said *Margaret Edwards* was his legal personal representative."

1844.

 EDWARDS
 v.
 JONES.

On the hearing of the appeal motion,

Mr. *Renshaw*, for the Plaintiffs, proposed to give in evidence the letter alleged in the bill to have been written by the Defendant *Pierce Jones*, in answer to that of Mr. *Roberts*, with an affidavit verifying the handwriting of the Defendant, and also an affidavit, by the Plaintiff himself, of the fact of *H. Powell* having died in a hospital at *New York* on the 12th of *December* 1889.

Mr. *Craig* (*absente* Mr. *Temple*), for the Defendants, objected to the reception of the evidence, contending that the latter affidavit was clearly inadmissible, the object of it being to prove not a document, but a fact which

1844.

 EDWARDS
 v.
 JONES.

which was in issue in the cause; *Barrett v. Tickell* (a), *Castellain v. Blumenthal*. (b) It was true that in *Ord v. White* (c) the present Master of the Rolls had denied the distinction; but that was a mere dictum, founded on the supposition that the rule laid down by Lord Eldon in *Barrett v. Tickell* (a) was at variance with the opinion which he had expressed on former occasions. But neither in *Jefferys v. Smith* (d), nor in *Morgan v. Goode* (e), which were probably the cases referred to, were the affidavits received; and in the latter of these cases Lord Eldon stated that where affidavits had been admitted in support of allegations made by the bill, those allegations had related to acts of the parties.

As to the admissibility of the letter as an exhibit, he contended that, at this stage of the cause, even documents could be so produced only where the Defendant by his answer stated that he was wholly ignorant of them; *Taggart v. Hewlett* (g); not where, as in this case, he denied, to the best of his recollection and belief, that any such letter was ever written by him; and that, after such an answer, the letter could not be so proved even at the hearing.

Mr. *Renshaw* relied upon *Morgan v. Goode*, *Jefferys v. Smith*, *Hodgson v. Dean* (h), *Addis v. Campbell* (i), *Ord v. White*, and argued that it was not necessary to apply so strict a rule to a motion for the production of documents as to applications for an injunction to restrain the exercise of a legal right.

The

(a) *Jac.* 154.

(b) 12 *Sim.* 47.

(c) 3 *Beav.* 357. See p. 367.

(d) 1 *J. & W.* 298.

(e) 5 *Meriv.* 11.

(g) 1 *Meriv.* 499.

(h) 2 *S. & St.* 221.

(i) 1 *Beav.* 258.

The LORD CHANCELLOR said he saw no ground for any distinction ; and that he thought there was in this case sufficient denial in the answer to exclude the affidavit as to the letter ; and that, according to his present impression, the balance of authority was against the admission of the affidavits at all ; but he would look into the authorities before he finally disposed of the case.

1844.
EDWARDS
v.
JONES.

On coming into Court the following day,

His Lordship said he had looked at the cases, and that they confirmed the opinion which he had yesterday expressed, that the affidavits were not admissible either for the purpose of verifying the letter or of proving the time of *H. Powell's* death.

The next question was, whether there was upon the answer itself a sufficient admission of the Plaintiff's title to support the motion.


The argument on that point turned upon the doctrine discussed in *Adams v. Fisher. (a)*

The LORD CHANCELLOR, after stating the short substance of the pleadings, proceeded. Dec. 21.

In this state of the pleadings a motion was made for the production of the documents mentioned in the schedule to the answer. In support of the motion the Plaintiffs offered to prove as an exhibit a letter alleged to have been written by the Defendant to the Plaintiffs' solicitor, referring to the death of *Howell Powell*. I thought the letter could not be received, because it was in opposition.

(a) 3 Myl. & Cr. 526.

1844.



EDWARDS
v.
JONES.

tion to the statement in the answer, that the Defendant was old and infirm, and that he had no recollection of having written such a letter. Then another affidavit was offered to prove the fact that *Howell Powell* was alive at the time of the death of the intestate. Now, where the question at issue is, not the existence of a document, but a fact, I think that an affidavit cannot be admitted to prove it, on an interlocutory application like the present, though the answer neither admits nor denies it. There is an apparent discrepancy between the authorities upon the subject; but I think that is the fair result of them. I expressed this opinion in the course of the argument, after looking at the cases; and I see no reason to alter it.

The question, therefore, is, whether, on the bill and answer, unsupported by affidavits, the Plaintiffs are entitled to make this motion.

The Defendants say that they are not, and they rely on *Adams v. Fisher*. There, the title was denied, and the answer stated that the documents would not shew it. Here the Defendants do not deny the Plaintiff's title, but state that they are ignorant, altogether ignorant, whether the fact on which it depends is or is not as stated by the Plaintiffs. And another question will be, whether the answer sufficiently states, to the satisfaction of the Court, that the documents do not relate to that fact: if not, the case does not fall within *Adams v. Fisher*, independently of the circumstance that the answer does not deny the title. The question in the cause is, whether *Howell Powell* was alive at the death of the intestate. Now the answer is in these terms: "The Defendants say they have certain documents in their possession, and they admit that these documents relate to the matters mentioned in the bill, except the question of the death of *Howell Powell*."

Powell." I don't think that is enough, because the documents might relate to the title of the Plaintiff without strictly and in terms relating to the death of *H. Powell*; for instance, the Defendants may have made entries in their books; they may have stated an account, or they may have written letters, which, although they might contain no express reference to the death of *H. Powell*, might tend to shew that the Defendants, at the time when they did those acts, treated and considered the Plaintiff as entitled to a share of the estate as his representative.

1844.

 EDWARDS
 v.
 JONES.

Under these circumstances I do not think the answer sufficiently negatives the fact that the documents relate to the Plaintiffs' title. Therefore the case of *Adams v. Fisher* does not apply, and the documents must be produced.

My first impression certainly was, that the documents ought not to be produced. But, on further consideration, I have altered my opinion. The answer is very skilfully drawn, and has evidently been drawn with a view to this very question. I have no doubt that every thing that could be said for the protection of the documents was said in it; but I do not think it is sufficient for the purpose.

Mr. *Renshaw* then asked that the Vice-Chancellor's order might be discharged.

The LORD CHANCELLOR. I shall not interfere with the Vice-Chancellor's order. The costs of this motion will be costs in the cause.

1844.

Dec. 17.

CASS v. CASS.

As a general rule, the transfer of a supplemental cause from one branch of the Court to another, carries with it the original cause, though not expressly mentioned in the order.

IN this suit a decree was made at the Rolls in *April* 1834; one of the Plaintiffs afterwards became bankrupt and died, and a bill of revivor and supplement having been filed against his personal representative and assignees, the supplemental cause was set down to be heard before the Master of the Rolls; but on the 11th of *May* 1842, before it was heard, it was transferred to the Court of Vice-Chancellor *Wigram*, and a second supplemental bill having been afterwards filed, a decree was made by his Honor in both the supplemental causes.

Mr. Walker afterwards moved before the Vice-Chancellor for the re-examination, before the Master, of two witnesses who had been previously examined in the original cause: but the notice of motion being intituled in the original cause only, which was not expressly included in the order of transfer, *Mr. Rolt*, for the adverse party, objected that the motion was made in the wrong court, to which it was replied that as no step could be taken in the original cause alone, that cause having abated, the order of transfer should be taken to have, in effect, transferred the original cause, though not expressly named in it, as well as the supplemental cause. The Vice-Chancellor having desired that the point might be mentioned to the Lord Chancellor, it was now mentioned accordingly, when

Mr. Rolt submitted that, as the original cause had never in fact been transferred, and as the present motion was intituled in that cause only, the most convenient course would be, if any transfer were necessary for the present purpose, to retransfer the supplemental causes back to the Rolls.

The

The LORD CHANCELLOR.

1844.

CASS
v.
CASS.

I do not interfere in the transfer of causes from one branch of the Court to another ; I merely act upon the suggestion of the Judge to whose court the cause for the time being belongs. The Master of the Rolls was the person who in fact made the transfer in this case, and I must assume that he intended to transfer the original cause at the same time ; if that has not been done I must suggest to the Master of the Rolls the propriety of transferring it now.

It should be understood as a general rule, that, when there is no special reason to the contrary, the transfer of a supplemental cause carries the original cause with it.

In the Matter of LOCKEY, a Lunatic.

1845.
Jan. 15. 24.

ON the 24th of *January* 1842, the committee of the lunatic's estate was discharged for not passing his accounts, and it was referred to the Commissioner to approve of a new one. On the 22d of *March* following the discharged committee was ordered to pass his accounts, and on the 16th of *January* 1844 he was ordered to pay the balance which the Commissioner found due from him into court. That order having been disobeyed, several subsequent applications were made by the new committee for the purpose of enforcing,

The sureties in a committee's recognizance, the condition of which was that the committee should obey the orders of the Lord Chancellor with respect to the lunatic's estate, held liable on the default of the

committee, not only for the balance reported due from him on his accounts, but also for the costs of proceedings subsequently taken against him for the purpose of enforcing payment of such balance, although the sureties had no notice of the default of their principal until after those proceedings had been taken.

1844.


In re
LOCKEY.

ing it, and after the time of payment had been several times enlarged, the late committee absconded. The new committee then presented a petition, praying that the recognizance entered into by his predecessor might be delivered out for the purpose of its being put in suit against his sureties. Upon that petition, the service of which upon the sureties was the first intimation that they had received of the default of their principal, an order was made, that they should be at liberty within a given time to pay the balance found due from the late committee, and certain costs, including the costs, charges, and expenses of and incident to the proceedings which had been taken against their principal for the purpose of enforcing the original order for payment, and that in default thereof the recognizance should be delivered to the petitioner.

The sureties were willing to pay the sum originally ordered to be paid by the late committee, but they objected to pay the costs, charges, and expenses, subsequently incurred, and which amounted to as much more. In consequence of that objection, and to avoid the necessity of putting the recognizance in suit, it was arranged that the question should be decided by the Lord Chancellor, upon a petition to be presented by the new committee praying payment, by the sureties, of the whole amount claimed.

Such petition was accordingly presented and now came on to be heard.

Mr. *Elmsley*, for the petition, relied on the condition of the recognizance, which was, that the committee should duly account, &c., “and carefully observe, perform, and keep the orders and directions of the Lord Chancellor touching or concerning the lunatic and his estate.”

Mr.

Mr. *Toller*, for the sureties, referred to *Dawson v. Raynes* (a), and insisted that notice of the committee's default ought to have been given to his sureties when it first occurred, or, at the latest, upon his non-compliance with the order of the 16th of *January* 1844, as they might then have prevented the necessity for the subsequent proceedings by immediate payment of the amount due from him; and that in the absence of such notice it was unjust to make them pay the costs of those proceedings.

1844.

In re
 LOCKEY.

The LORD CHANCELLOR.

The condition of the bond is, that the committee shall obey the orders of the Lord Chancellor with respect to the lunatic's estate. It follows therefore that in case of his disobedience, the sureties are liable for every thing that the committee was liable for. I have ordered him to pay these costs, and he has not paid them: that is an order relating to the lunatic's estate. I think, therefore, the sureties are clearly liable to pay them. If the sureties were not apprised of the proceedings it was their own fault, for it was their duty to see that the committee duly passed his accounts.

(a) 2 *Russ.* 465.

1845.

Jan. 20.

Ex parte ELIZABETH SNOOK.

In the Matter of GEORGE WATTS, an alleged
Lunatic.

An application by a mortgagee of an alleged lunatic's estate to be allowed to attend by counsel at the inquisition, refused, the applicant declining to be bound by the result of the proceedings.

THE petitioner was heiress at law and sole next of kin of *William Snook*, who died on the 10th of *November* 1844 intestate, having at various times since the year 1834 advanced large sums, amounting together to upwards of 8000*l.*, to the alleged lunatic on mortgage of his real estates. At the time of the death of the intestate a suit which he had instituted to foreclose the mortgage was upon the point of being heard. On the 2d of *November*, the wife of the alleged lunatic, who had joined with her husband in several of the mortgage securities, applied for a commission of lunacy, whereupon this petition was presented, alleging that the wife's object in applying for the commission was to defeat the mortgage securities by carrying back the lunacy to a period antecedent to their date; and it prayed that a commission might not issue, or, if it did, that the petitioner might be at liberty to attend the execution of it by her counsel.

The Lord Chancellor having been satisfied, by affidavits and a medical report, that a commission ought to issue, the question now was, whether the petitioner should be at liberty to attend the execution of it by counsel.

Mr. *Anderdon* and Mr. *Bird*, for the petitioner relied on *Ex parte Hall* (a), where Lord *Eldon*, in ordering a commission to issue, directed that due notice of its execution

(a) 7 *Ves.* 261.

tion should be given to a party who had contracted with the alleged lunatic for the purchase of part of his property, and due notice not having been given, Lord *Eldon* allowed the party to traverse the inquisition, at the same time doubting whether, on the ground of his order not having been obeyed, he ought not to quash the inquisition.

1845.

In re
 WATTS.

On the other hand, the Secretary produced a MS. note of a case, *Ex parte Newbury*, before Lord *Cottenham*, where his Lordship refused a similar application, unless the petitioner would consent (which he declined to do) to be bound by the result.

The LORD CHANCELLOR.

I think that is a very proper condition to impose: otherwise by intervening in the inquiry you augment the expenses of the investigation, and, after all, are not bound by the result: then, availing yourself of the facts which come out on the inquiry, you apply in another shape to traverse the inquisition, and put the estate to the same expense a second time. I do not think that ought to be allowed.


His Lordship then asked the counsel for the petitioner whether they would consent to a similar condition in the present case, which they declined to do, but offered to leave the whole expenses of the inquiry, including those of the lunatic himself, to the discretion of his Lordship; and they insisted strongly on the hardship of allowing an inquisition to be made behind the petitioner's back, establishing a *prima facie* case of lunacy, which she would have to combat in any attempt she might make to enforce her securities.

Mr. *Wakefield* and Mr. *Wright*, *contra*.

M m 3

The

1845.


In re
WATTS.*The* LORD CHANCELLOR.

The Secretary has made diligent search, but has found no case in which such an order as is now asked has been made upon the application of an individual, whose object is, not to shew that the party is not insane, but to fix a particular date to the commencement of the lunacy, with a view to his own interest, and not to the interest of the lunatic. I will not be the first to establish such a precedent. Lord Cottenham refused a similar application in *Newbury's Case* unless the petitioner would consent to be bound by the result; and no great reliance is to be placed on *Ex parte Hall*, for not only was the application there made *ex parte*, but it is clear that Lord *Eldon* had afterwards great doubts about the propriety of the order.

Petition refused with costs.

Feb. 14.

A petition for a similar object was afterwards presented by the presumptive heir of the alleged lunatic, suggesting that the latter had, after the commencement of his lunacy, made a will in favour of his wife, and on that ground praying leave to intervene in the proceedings.

Mr. *Younge* appeared for the petitioner.

Mr. *Wright, contra*, said that the petitioner was acting in collusion with the mortgagee, whose application had before been refused.

The LORD CHANCELLOR.

I do not think there is any case to be found in which a party has been allowed to intervene for an object of the kind here stated: I mean where the object is not to benefit the lunatic, but the party himself who makes the application.

application. I shall inquire whether there is any such case, but even if I find there is, I shall require satisfactory evidence that the petitioner is not acting in collusion with other parties.

1845.

In re
WATTS.

The petition was not mentioned again.

DALTON v. HAYTER.

Jan. 27.

THE eight days after the delivery of exceptions to the answer having expired on a *Saturday*, the Plaintiff obtained the usual order to refer them on the *Monday* following, but neglected to serve it until the following *Saturday*.

The Master of the Rolls, afterwards, upon the motion of the Defendant, discharged that order on the ground that it had not been served until after the expiration of the six days allowed for the purpose by the Order V. of 3d of *April* 1828.

The Plaintiff now moved before the Lord Chancellor to discharge the order of the Master of the Rolls.

Mr. *Wakefield* and Mr. *Wood*, for the motion.

not to move to discharge the order, but to take the objection before the Master.


Whether, in the computation of the six days allowed by the 5th General Order for referring exceptions, a *Sunday*, being the first of such days, is to be counted, *quære. (a)*

(a) See now the 13th Order of the 8th *May* 1845, from which it would seem that henceforth *Sunday* will be counted in all cases except where it is the last day.

Where a Plaintiff has obtained an order referring exceptions to the answer, within six days after the expiration of the eight days allowed to the Defendant for submitting to them, but has neglected to serve it until after the expiration of the six days, the order is merely useless, but not irregular, and the proper course for the Defendant is

It

1845.


DALTON
v.
HAYTER.

It is settled that where a limited period is allowed for taking a step in a cause, and the *last* day falls on a *Sunday*, that day does not count. The rule ought to be the same where the first day falls on a *Sunday*, more particularly when the act to be done is to be done in court. The eight days allowed for demurring are eight office days. *Bullock v. Edington.* (a) So here, the object of the general Order was to give the Plaintiff six days, in any one of which he might take the step in question. But not only could he not obtain the order to refer the exceptions until *Monday*, but he had not until then even the means of knowing whether the Defendant had submitted to the exceptions or not. *Sunday* does not count as one of the two clear days required for notice of a motion (b), or in the four-day rule to appear and plead at common law. *Wathen v. Beaumont.* (c)

Mr. *Roupell* and Mr. *Beavan*, *contra*, insisted that practice had settled the question, and that *Sunday* was always counted, except where it happened to be the last day: *Mackintosh v. Great Western Railway.* (d) They also referred to *Attorney-General v. Clack* (e) and *Hunter v. Capron* (g) as shewing, that where an order, though regularly obtained, was not served within the prescribed time, the course was to move to discharge it, and not to leave it to the Master to decide upon its validity.

The LORD CHANCELLOR said, he would inquire whether there was any settled rule upon the point, and if there was not, it would be necessary to establish it now once for all.

The

(a) 1 *Sim.* 481.

(b) 3 *Dan. Pr.* 258.

(c) 11 *East*, 271.

(d) 1 *Hare*, 528.


(e) 1 *Myl. & Cr.* 367.

(g) 5 *Beav.* 93.

The LORD CHANCELLOR.

1845.

The question which was argued in this case does not in fact arise; for the order to refer the exceptions, having been obtained within the six days, was clearly regular, and that being the case there was no ground for applying to the Court to discharge it, and the motion made for that purpose before the Master of the Rolls ought therefore to have been refused.


DALTON
v.
HAYTER.
Feb. 28.

In *Taylor v. Harrison* (a), the order referring the exceptions was obtained in proper time, but not served until a day after the six days had expired. No application was made to discharge the order of reference, but the Master having proceeded upon it, and allowed the exceptions, the Vice Chancellor ordered his report to be taken off the file, and the Lord Chancellor on appeal confirmed that decision. That was upon the ground that the order was a nullity unless served within six days. A similar case occurred a few days ago at the Rolls, of which the Master of the Rolls has given in a note; it was in a cause of *Macdonald v. Plummer*. Exceptions were filed on the 17th *January*, on the 27th an order was obtained to refer them, but was not served until the 1st *February*, which was out of time. The Court, nevertheless, considered the order regular, and a motion to discharge it was accordingly refused with costs.

It will be for the Master, when the Plaintiff proceeds upon the exceptions, to consider whether the order was or was not served in time, and the question may perhaps come before the Court again by way of appeal from his decision; but on this motion I have only to consider whether the order of the Master of the Rolls was right, and I think that order must be discharged.

(a) 1 *Myl. & Cr.* 274.

1845.

Feb. 11.

CALVERT v. GANDY.

The time limited by the 39th Order of August 1841, for setting down a cause for argument upon an objection for want of parties, cannot be enlarged except by consent.

AFTER the expiration of fourteen days from the filing of the answer, the Plaintiff moved before the Vice Chancellor of *England*, upon an affidavit accounting for the delay, for leave to set the cause down for argument upon an objection taken by the answer for want of parties, notwithstanding the time limited for that purpose by the 39th Order of August 1841 had expired. His Honor refused the motion, on the ground that those orders being incorporated in the Act of parliament, under the authority of which they were issued, the Court had no discretionary power to relax them. The application was now renewed by way of appeal before the Lord Chancellor.

Mr. *Bagshawe* for the motion, referred to *Kershaw v. Clegg (a)*, and insisted on the inconvenience that would result from excluding, in the application of these Orders, the discretion familiarly exercised by the Court with respect to all the other general rules of its procedure. The object of the Order in question was, to enable the Court, for the sake of convenience, to hear a cause upon a particular objection before it was ripe for hearing generally; for that purpose the intervention of the legislature might be necessary, but it did not follow that the particular time fixed by the order was so much of the essence of the enactment as absolutely to preclude the Court from extending it. It was not repealing the Act to treat the time as merely directory; and any other construction

(a) *Antè*, p. 120.

construction of the Order would in many cases defeat the object of it.

1845.

CALVERT

v.

GANDY.

Mr. Lloyd, contra, observed that the application in *Kershaw v. Clegg* was not opposed, and that the Lord Chancellor's attention was not called to the circumstances which distinguished those Orders from the Orders issued solely by the authority of the Court.

Mr. Bagshawe in reply, said he had been informed that the general rules of pleading promulgated by the judges of the courts of common law under the authority of a similar Act, were not so strictly construed, and that the relaxation of these rules as to time was a matter of every day's practice. (a)

The LORD CHANCELLOR.

The Orders of *August* 1841 were made by the Lord Chancellor, with the advice and consent of the Master of the Rolls, in pursuance of the 4 *Vict. c. 94.* and the 4 & 5 *Vict. c. 52.*, which provide that all rules, orders, and regulations so made should be laid before the Houses of Parliament; and that from and after the making thereof, they should be binding and obligatory on the Court, and be of like force and effect as if the provisions therein contained had been expressly enacted by parliament; subject, however, to the right of either House of Parliament to annul them by any resolution passed at any time before such House should have actually sat thirty-six days after such rules, &c. should

(a) In the *Reg. Gen. of Hilary term*, 4 *W. 4.* it is expressly provided that the times limited thereby for doing certain things may be extended by a Judge's order.

5 *B. & Ad. xvi.* And the New Orders in Chancery of the 8th *May* 1845 contain a similar provision. Order xxi.

1845.


CALVERT
v.
GANDY.

should have been laid before it. Those orders have therefore the force and effect of an act of parliament. I have the power, with the concurrence of any two of the other judges of the Court (*a*) to rescind them and substitute others: but without going through the forms prescribed by the Act, I have no power to vary them. I should be very glad if I could put a different construction upon the Act, for this is certainly a very inconvenient one; but I do not see how I can.

In my own Orders of 1828, the first intention was to have annexed them to an act of parliament, and I actually brought in a bill for the purpose; but afterwards, I felt the very difficulty which has now occurred, and accordingly did not carry through the bill, but issued the orders as the orders of the Court only.

The motion must be refused with costs.

(*a*) 5 *Vict. c. 5. s. 29.*

1845.

MURRAY v. VIPART.

Jan. 16. 19.

THE Defendant, who was residing at *Boulogne* in *France*, was an executrix; the Plaintiffs were trustees of a sum of stock which was standing in the name of the testator. The bill was filed to obtain a transfer of the stock into the names of the Plaintiffs. The Plaintiffs put a distringas on the stock, and their solicitor applied by letter to the Defendant to transfer it. To that letter he received no answer; but shortly afterwards, on the 2nd *December*, 1844, he received a letter from a *Mr. Bennett*, stating that the Defendant had forwarded the letter of the Plaintiffs' solicitor to him (*Bennett*), and had instructed him to do what was necessary in the matter on her behalf. Upon an affidavit of these facts, the Plaintiffs applied to Vice Chancellor *Knight Bruce*, for an order that service upon *Mr. Bennett* of the subpoena to appear and answer might be good service upon the Defendant. His Honor, after hearing the case, desired that the application might be made to the Lord Chancellor.

If the Court can be satisfied that a Defendant who is out of the jurisdiction has given a special authority to a person within the jurisdiction to act for him in the matter to which the suit relates, it will order that service of the subpoena to appear and answer on that person shall be good service on the Defendant; but the evidence of agency will be closely scrutinized.

Mr. Anderson now moved accordingly, and cited *Hobhouse v. Courtney* (a), *Weymouth v. Lambert* (b), and *Webb v. Salmon*. (c)

The LORD CHANCELLOR, after taking time to look into the authorities, said that he thought the principle laid down by the Vice Chancellor of *England* in *Hobhouse v. Courtney* was the right one, viz. that where the Defendant

(a) 12 *Sim.* 140.

(c) 3 *Hare*, 251.

(b) 5 *Beav.* 533.

1845.

MURRAY
v.
VIPART.

Defendant was abroad and had appointed an agent to act for him in the suit, service on that agent would be good service on the principal. That being the case, the only question here was, whether there was evidence enough to satisfy the Court that the Defendant had made *Bennett* her agent for the purposes of this suit. It was obviously so easy to get up a case of this sort by collusion between the Plaintiff and a third party, that great caution was necessary; but he thought that the affidavits in this case were satisfactory upon that point, and that the order might be made. His Lordship, however, desired, for the sake of greater caution, that another letter should forthwith be written to the Defendant, apprising her of the application, in order that if there was any mistake, she might have an opportunity to intervene.

Jan. 17. 21.

FULTON v. GILMORE.


A Defendant who had by answer insisted on his discharge under an Insolvent Debtors' Act in *India* as a defence to the suit, but had stated such discharge, as to his belief, as of a date which would

THE Plaintiff and her brother and sister were residuary legatees under a will of which the Defendant and one *Stewart Smith* were the acting executors. The brother and sister had been paid their shares of the residue: but the Plaintiff's share had during her infancy been deposited by the executors in a mercantile house in *Calcutta*, in which the Defendant was a partner. The firm and all the partners in it afterwards became insolvent, and the Defendant,

as

not entitle him to the benefit of the Act, was allowed after the cause was in the paper for hearing, to file a supplemental answer for the purpose of correcting the error in the date, and thereby bringing himself within the protection of the Act.

as trustee for the Plaintiff, proved the amount of her fortune so deposited, as a debt against the joint estate. The bill which was filed on the 9th *May* 1843, and was originally framed on the supposition that the Plaintiff had been declared a bankrupt, and had obtained his certificate, under a fiat issued against him in *England*, and consequently that he was discharged from personal liability for the breach of trust, sought only an account of the dividends received by him upon the above-mentioned proof. It contained, however, an allegation "that he, as well as his partners, had been adjudged insolvents in or about the month of *November*, 1833, under the provisions of the Acts of parliament then in force for the relief of insolvent debtors in the *East Indies*, and that they were subsequently discharged under an order or orders made by the Court for the relief of insolvent debtors at *Calcutta* under the provisions of the said Acts." The same bill also stated as a reason for not making *Stewart Smith* a party, that he had in the year 1842 been adjudged insolvent under the provisions of the Acts of parliament then in force for the relief of insolvent debtors in *India*; and that he had been discharged by order of the Insolvent Court at *Calcutta* under the provisions of those Acts.

1845.

 FULTON
 v.
 GILMORE.

The Defendant in his answer to that bill admitted the statement as to his insolvency and discharge in *India* in the very terms of the bill, but denied that he had ever been declared a bankrupt under any fiat in *England*, and he insisted that *Stewart Smith* was a necessary party to the suit.

The only Act for the relief of insolvent debtors in *India* which was in force in the year 1833 was the 9 G. 4. c. 73., under which the discharge of the insolvent did not operate as against creditors residing out of the limits of the *East India*

1845.

FULTON
v.
GILMORE.

India Company's Charter, and who had not come in under the insolvency. A subsequent Act, however, was passed in *August* 1834 (4 & 5 *W. 4. c. 79.*) for the purpose of making the discharge effectual against all creditors. And by that Act it was provided that notice of the petition for such discharge should be given both in the *East India Gazette* and in the *London Gazette*, and that the order for the discharge should not be made until the expiration of fourteen calendar months from the filing of such petition.

On the coming in of the answer, the Plaintiff took several exceptions to it, one of which was, that it did not state, as required by the interrogatory in the bill, at what particular time the Defendant had obtained his discharge in *India*. On the exceptions being allowed, the Plaintiff obtained an order to amend the bill, and that the Defendant might answer the exceptions and amendments together. She amended the bill accordingly by stating that she did not reside within the limits of the *East India* Company's Charter at any time between the filing of the Defendant's petition for his discharge, and the date of the order for such discharge, and that she was an infant during the whole of that time, and did not take part in any of the proceedings under the said petition, and she therefore insisted that the Defendant was liable to her, not only for the amount of the dividends received on the proof, but for the whole amount of her fortune; and she prayed relief accordingly.

In the further answer the Defendant, after stating that he and the other members of the firm were "at or about the time in the bill mentioned, duly adjudged insolvents under the provisions of the several Acts then in force for the relief of insolvent debtors in the *East Indies*," stated "that he and they were, subsequently to the
month

month of *August* 1834, viz., as he believed, in the month of *April* 1835, duly discharged, according to the provisions of such acts, as in his former answer and therein mentioned." And in a subsequent part of his answer there was the following passage:—"The Defendant insists on the benefit of the certificate, and the order pronounced for his discharge, under the provisions of such Acts of parliament as aforesaid, in bar of all such parts of the Plaintiff's claim as relate to any loss sustained by reason of the insolvency of the said firm."

1845.
FULTON
v.
GILMORE,

In that state of the record the cause was set down for hearing; and after it had been several times in the paper of causes at the Rolls, the Defendant applied to the Master of the Rolls for leave to file a supplemental answer, for the purpose of substituting 1836 for 1835 as the year of his discharge. The application was supported by an affidavit, stating that, in a conversation which the Defendant had had a few days before with the solicitor of one of his late partners who had applied for his discharge in *India* on the same day with himself, he learnt incidentally, for the first time, that the application for such discharge had been made in 1835, and consequently that his discharge was obtained in 1836, and not, as stated in his former answer, in 1835. He further stated, that at the time of putting in his answer he had not his discharge to refer to, nor was he aware until now that applications for discharges in *India* were advertised in the *London Gazette*; but that, on referring to that *Gazette* for the 4th *September* 1835, he found his name in the list of insolvents who had been advertised in the *Calcutta Gazette* of 4th *March* 1835, as having applied for their final discharges under the provisions of the 4 & 5 *W. 4. c. 79*.

1845.


FULTON
v.
GILMORE.

The Master of the Rolls having granted the motion, the Plaintiff now moved to discharge his Lordship's order.

Mr. *Wakefield* and Mr. *Toller*, for the motion, took three points.

1st. That there was no instance of an application for leave to file a supplemental answer having been granted at so late a stage of the suit; and that in *Macdougall v. Purrier* (a) the application had been refused expressly upon that ground.

2nd. That the mistake, if any, was a mistake not of fact but of law. For the exception to the first answer was sufficient to call the Defendant's attention to the materiality of the date of his discharge, with reference to the more extensive relief given to insolvents by the second Act of parliament; and his insisting by his answer that his co-executor, who was admitted to have obtained his discharge several years after the passing of that act, was a necessary party to the suit, shewed that he was not aware of the existence of the second Act, or at least of the more extensive relief to which a discharge under it would entitle him. The application therefore, though in form an application to correct a mistake in a date, was in substance an application to set up a new defence.

3rd. That applications of this kind, being for indulgence, would not be granted where the object was to defeat the moral justice of the case. The Defendant had committed a gross breach of duty in exposing the fortune of his ward to the risks of trade. If he was able to
make

(a) 4 *Russ.* 486.

make good the loss, which for any thing that appeared to the contrary he might be, the court would not go out of its way to relieve him from the obligation.

1845.
FULTON
v.
GILMORE.

Mr. Roupell and Mr. Tennant, *contra*.

The following cases were cited:—*Strange v. Collins* (a), *Edwards v. M'Leay* (b), *Wharton v. Wharton* (c), *Nail v. Punter* (d), *Jackson v. Parish* (e), *White v. Sayer* (g), *French v. Myles* (h), *Wells v. Wood* (i), *Greenwood v. Atkinson* (k), *Patterson v. Slaughter* (l), *Curling v. Lord Townshend*. (m)

The LORD CHANCELLOR.

Jan. 21.

In support of this motion the case was shaped in two ways. It was first contended, that if this was an ordinary case I ought not to allow a supplemental answer to be filed; and, secondly, it was said that, supposing that in an ordinary case I should allow it, this is an unrighteous defence, and that I ought not to aid it by acceding to the application.

With respect to the first point, the Defendant states, in his first answer, that he was duly declared insolvent in *November* 1833, under the acts then in force in *India* for the relief of insolvent debtors, and that he was subsequently discharged by the Court at *Calcutta*, under the provisions of the said acts. In his further answer he

(a) 2 *V. & B.* 163.

(b) *Id.* 255.

(c) 2 *Atk.* 294.

(d) 4 *Sim.* 474.

(e) 1 *Sim.* 505.

(g) 5 *Sim.* 566.

(h) 4 *Mad.* 404.

(i) 10 *Ves.* 401.

(k) 4 *Sim.* 54.

(l) *Ambl.* 292.

(m) 19 *Ves.* 628.

1845.



FULTON
v.
GILMORE.

he says, that in 1833 he was adjudged insolvent by the Court to which I have referred, and that afterwards, as he believes in *April* 1835, he was duly discharged under the provisions of the said acts.

That is the shape of the present answer. The Defendant, however, by his affidavit, says he has discovered that he made a mistake; that he was not discharged in 1835, but that the date of the order was in 1836. He is therefore not insisting on another discharge, a different one from that referred to in his answer, but merely seeking to correct a mistake as to the date of that discharge. And the question is, whether he ought to be allowed to do so. It is rather a startling proposition to say that he ought not. He says, that at the time of filing his answer he had no documents in his possession relating to his discharge; and that is confirmed by the answer itself, in which he gives the date of his discharge as to his belief only. He says that he only discovered the mistake in the course of a recent conversation with the solicitor of one of his late partners; and that he was not before aware that it was usual to publish in the *London Gazette* the discharges obtained in *India*; and that he was led into the mistake by not being in possession of any documents which would enable him to state the date accurately. It would be extraordinary if a slip of that kind in an ordinary case should not be allowed to be corrected.

Several cases were referred to, each depending on its own circumstances. In *Patterson v. Slaughter* the amendment was allowed. The application was not made in the first instance to amend, but it was suggested by Lord *Hardwicke* that that would be the proper course. I was cautioned against relying upon the report of that case,

case, and I have therefore had a search made for the order which was pronounced. The case was of this description. The Defendant claimed an estate as against the Plaintiff, under a devise from Sir G. *Warburton*, whom he stated in his answer to be heir of *Richard Egerton*. He afterwards discovered, by a paper communicated to him, that Sir G. *Warburton* had also a title as mortgagee, and that he had incorrectly stated the pedigree. The application was for leave to amend the record for the purpose of making these new facts available for his defence. The result was, that Lord *Hardwicke* gave leave to amend the pedigree, confining the amendments to setting out the variations from the former answer applicable to that point, and that point alone. If any decision was necessary in a case of this sort, that would be in point. The Defendant merely wishes to correct a mistake in the date of a proceeding material to his defence, which date he originally said that he was not certain of, but stated it only as to his belief. I think in an ordinary case a supplemental answer ought to be filed to correct such a mistake.

1845.

 FULTON
 v.
 GILMORE.

But then it is said that this is an unrighteous defence, and therefore that I ought not to assist it. Now the case is of this nature:— The testator devised certain estates to trustees, in trust to sell and divide the proceeds amongst his children. *Gilmore* was an executor and trustee; he sold the property, and converted it into money; and instead of investing it according to the direction of the will, in government securities, he deposited it in a house of trade. The two elder children, as they successively came of age, were paid their shares; but before the Plaintiff came of age the house failed. The Plaintiff now claims the dividends received under the insolvency, and calls upon the Defendant to make

1845.

FULTON

v.

GILMORE.

good the deficiency. It is suggested that he may be rich, and able to make it good; but there is nothing before me to shew whether he is rich or poor: the defence is one which the law allows in a case of this kind as well as in any other. There is nothing in the pleadings to enable me to say that this is an unrighteous defence. If I were to attempt to come to such a conclusion from the facts before me, I should run the risk of doing great injustice.

I must therefore consider this as an ordinary case, and, as such, I think it is one in which the party ought to be allowed to file a supplemental answer. It is true that it is rather late in the cause to amend the record; but that is material only with respect to costs.

Feb. 20. 28.

MAN v. RICKETTS.

The time allowed for enrolling a decree or order is six calendar months from the date thereof.

THIS was a motion by one of the Defendants to vacate the enrolment of the decree.

The decree bore date the 22d *February* 1844. The docquet of the enrolment was signed by the Lord Chancellor, on the 15th *August*, being within six calendar months, but not within six lunar months, from the date of the decree. No caveat had been entered by the Defendants, nor had the Plaintiffs obtained any order to enrol *nunc pro tunc*.

Mr.

Mr. *Cooper* and Mr. *Kent*, in support of the motion, contended that Lord *Clarendon's* order of 1661 (a) was still in force, 2 *Daniell's Pr.* p. 679., and that the decree, having been pronounced as of *Hilary* term, could not regularly be enrolled after the first day of *Easter* term without an order for leave to enrol it *nunc pro tunc*.

1845.
MAN
v.
RICKETTS.

Mr. *Hallett*, *contrà*, contended that Lord *Clarendon's* order had long been obsolete, and that by the modern practice a party had six months to enrol a decree, 2 *Smith's Pr.* 5., and that those months were calendar, not lunar months.

Mr. *Cooper*, in reply, relied upon the general rule of law, by which a month is understood to mean a lunar month unless the contrary be expressed; *Attorney-General v. Newbury Corporation* (b).

The LORD CHANCELLOR.

I am told by the Registrar, that, notwithstanding Lord *Clarendon's* order, six months is the time allowed in practice, and that the months are calendar months. But if you wish it, I will send for a certificate of the practice.

On a subsequent day,

The LORD CHANCELLOR stated that he had received the following certificate from the Clerks of Records and Writs: —

“ That the six months allowed to enrol a decree or order are, by the practice of the Court, computed by calendar months. This practice has existed during all the

(a) *Bcames*, p. 205.

(b) *C. P. Cooper's Rep.* 383.

1845.

MAN
v.
RICKETTS.

the personal knowledge of the senior clerk of Records and Writs, viz. near sixty years; and it is so stated in a precedent book kept by the late Mr. *Deanes*, formerly secretary at the Rolls, who died in 1791, and which book is considered of high authority. It is also so stated to us by the present deputy to the Secretary of decrees, who has held that office, with the exception of a short interval, upwards of forty-six years, and who has always acted thereon; and we have never known that practice controverted."

It appears, therefore, (said his Lordship, after reading the certificate,) that the practice has for seventy years been at variance with the order of Lord *Clarendon*. Six months is the time, and that is a much more convenient rule than Lord *Clarendon's*; for it is a fixed period, whereas the other is a fluctuating one. As the books of practice are opposed to each other, it is not a case for costs.

1844.



1844.

Jan. 18.

1845.

Feb. 26.

MORRALL v. SUTTON.

THE will of *Edward Lloyd*, dated in 1789, was partly as follows:—“ I give and bequeath unto *Ann Elizabeth Waring*, *Sarah Calcott* the elder, and *Mary Spencer*, all my leasehold estate in *Gloucestershire*, held under the dean and chapter of *Bristol*, to hold to them for and during their joint natural lives, and the life of the longer liver of them, but subject nevertheless to, and charged and chargeable with, the following annuities; (that is to say,) one annuity of 20*l.* a-year to *Esther Jerginson* during her life, and one other annuity of 20*l.* a year to *Sarah Jerginson*, daughter of the said *Esther Jerginson*, during her life, and one other annuity of 10*l.* a year to Mrs. *Addenbrooke*, which several annuities I do hereby direct to be charged on my said estate in *Gloucestershire*, and to be paid half yearly, as the rents of the said estate can be received, without any deduction for taxes or otherwise. And from and after the decease of the said *Ann Elizabeth Waring*, *Sarah Calcott*, and *Mary Spencer*, I give, devise, and bequeath my said leasehold estate in *Gloucestershire* (subject to the said several annuities as aforesaid) to *Sarah Calcott* the younger, if she shall be then living, her executors, administrators, and assigns, subject to the said annuities charged thereon, during the term of her natural life. And if the said *Sarah Calcott* the younger shall die in the lifetime of the said *Ann Elizabeth Waring*, *Sarah Calcott* the elder, and *Mary Spencer*, leaving any lawful issue of her body that shall be living at the decease of the survivor of them, the said *Ann Elizabeth Waring*, *Sarah Calcott* the elder, and *Mary*

Of two inconsistent dispositions in a will (both being intelligible), whether occurring in the same sentence or in different sentences, the last is to prevail, unless a contrary intention can be safely inferred from the context.

Discussion as to the amount of internal evidence which will justify such an inference.

1844.

MORRALL


v.

SUTTON.

Mary Spencer, then I give, devise, and bequeath the said leasehold premises, from and after the several deceases of the said *Ann Elizabeth Waring*, *Sarah Calcott* the elder, and *Mary Spencer*, to such child or children of the said *Sarah Calcott* the younger as shall be then living, to be equally divided between them, if more than one, share and share alike; provided that if any child of the said *Sarah Calcott* the younger shall be then dead, leaving issue then living, such issue shall be entitled to the same share as his, her, or their parent would have been if then living, equally between them, if more than one. But if the said *Sarah Calcott* the younger shall die in the lifetime of the said *Ann Elizabeth Waring*, *Sarah Calcott*, and *Mary Spencer*, or either of them, without leaving any lawful issue of her body that shall be living at the decease of the survivor of them the said *Ann Elizabeth Waring*, *Sarah Calcott* the elder, and *Mary Spencer*, then I give, devise, and bequeath all my said leasehold estate in *Gloucestershire*, after their several deceases, (but subject to the said annuities to *Esther Jerginson*, widow, and her daughter, *Sarah Jerginson*,) to *Thomas Jerginson* and *Charles Morrall*, their executors, administrators, and assigns, for all the then residue of the said leasehold interest therein, in equal shares and proportions."

"And it is my will, and I do hereby require, that the person or persons who shall be possessed of the said leasehold estate by virtue of this my will shall renew the said lease as often as occasion shall require, and not permit or suffer the same to be forfeited or become void; and that the expense of renewing the same shall be paid by and out of the rents and profits of the said premises at the time of renewal thereof, without prejudice to the said annuitants; and that the several persons

sons entitled to the rents of the said estate, except the said annuitants, shall pay a proportion of such expense, according to the amount of their respective estates and interests in the said premises: and if any or either of such persons interested (except as aforesaid) shall refuse to pay a proportionable share thereof as aforesaid, that the persons in possession of the said premises may detain and deduct the same out of the estate."

1844.

 MORRALL
 v.
 SUTTON.

The question in the cause was, whether *Sarah Calcott* the younger, who survived *Elizabeth Waring*, *Sarah Calcott* the elder, and *Mary Spencer*, took an absolute interest in the leaseholds, or only an estate for life, the Defendant being entitled to the property in the former case, the Plaintiff in the latter.

The case was twice argued before the Master of the Rolls, who decided on both occasions in favour of the Plaintiff. The Defendant then appealed to the Lord Chancellor, and the appeal was heard in *January* 1844 by his Lordship, assisted by Mr. Baron *Parke* and Mr. Justice *Coleridge*.

Mr. *Kindersley*, Mr. *Wigram*, and Mr. G. *Russell* appeared for the Plaintiffs.

Mr. *Tinney*, Mr. *Bethell*, and Mr. *Chandless*, for the Defendants.

The learned Judges, being of different opinions, now delivered their respective judgments.

1845.
Feb. 26.

PARKE B. My Lord Chancellor, — I have fully considered the case which was argued before your Lordship, on the presence of Mr. Justice *Coleridge* and myself some time ago, and I have now to submit the opinion which

1845.

MORRALL

v.

SUTTON.


which I have formed upon it, and to assign the reasons for that opinion. I regret much that it is different from that of my learned brother.

The case lies in a very narrow compass, and depends upon the construction of one clause in the will of the testator, *Edward Lloyd*. By that clause the testator, after bequeathing three annuities together, and charging them on the testator's *Gloucestershire* estates, gives the estate to three persons, *Ann Elizabeth Waring*; *Sarah Calcott* the elder, and *Mary Spencer*, for their lives; and then the testator proceeds as follows:—"From and after the decease of the said three persons, I give and bequeath my said leasehold estate in *Gloucestershire* (subject to the said several annuities as aforesaid) to *Sarah Calcott* the younger, if she shall be then living, her executors, administrators, and assigns (subject to the said annuities charged thereon)" — in a parenthesis — "during the term of her natural life." And the question is, whether under this clause *Sarah Calcott* the younger, who survived the three tenants for life, took the absolute interest, or only a life interest, in the leaseholds.

In ascertaining the intention of the testator, or, to speak more correctly, the meaning of the words used by him in this clause, we must apply the rules of construction, which have been very wisely established for the purpose of attaining as great a degree of certainty in judicial decisions as the nature of the subject admits.

These rules, so far as they are applicable to the present question, are admitted to be, that technical words are, *primâ facie*, to be understood in their strict technical sense; that the clause is, if possible, to receive a construction which will give to every expression in

in it some effect, so that none may be rejected; that all the parts of the will are to be construed so as to form a consistent whole; that of two modes of construction, that is to be preferred which would prevent an intestacy; and that where two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention, and prevail. *Cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est.* Co. Litt. 112 b.


1845.

 MORRALL
 v.
 SUTTON.

It was argued indeed that this last-mentioned doctrine applied only to separate clauses: but it is not so, for it has been adopted where there are inconsistent expressions in the same clause, as in *Doe dem. Leicester v. Biggs (a)*, where the devise was to trustees "to pay unto, or else permit and suffer the testator's niece to receive the rents;" and it was held that the last words vested in her the legal estate.

In applying the above rules, the learned counsel on each side contend that the words on which they respectively rely are strictly technical; and so indeed they are, and are equally technical: but in their proper legal sense both are directly inconsistent with each other. Both counsel argue, however, that these expressions are only seemingly contradictory; and each contends that they may be best reconciled so as to establish the claim of their respective clients. The appellant argues that, assuming the absolute interest in the term to be given to *Sarah Calcott* by the words "to her executors, administrators, and assigns," the subsequent words "during her

(a) 2 Taunt. 113.

1845.


MORRALL
v.
SUTTON.

her natural life" may be explained to mean, that she should be subject to the annuities for her natural life, and so should be personally liable during life to them, though the lease might have determined.

The respondent's counsel, on the other hand, insist that the gift of the estate to *Sarah Calcott*, her executors, administrators, and assigns, may be made consistent with a gift to her of a life estate only, by understanding the former words in some secondary and imperfect sense, as that the rents or fruits of the estate fallen during the life of the legatee should devolve on her executors, or that the executors should have a right after her death to repay themselves any advance she might have made for renewal of the leases, as provided for in a subsequent clause, or that the legal estate was given to her and her executors, and the beneficial estate only for life.

There are great difficulties in adopting any of these explanations. That proposed by the appellant, besides being a very strained construction, requires us to reject the marks of parenthesis which are clearly visible in the probate of the will, and which shew that the testator means the sentence to be read, passing over the intermediate words, as if it had contained a gift to *Sarah Calcott*, her executors, administrators, and assigns, for her natural life. On the other hand, all the modes suggested on the part of the respondent have more or less of inconsistency, for all suppose a gift to executors and administrators of a person during life: that all of them make the words superfluous, is not a serious objection.

It is then contended for the appellant, that the context in the will affords such clear evidence of the testator's intention, as to enable us to decide between these contradictory provisions, and to call upon us to adopt the
construction

struction which gives the legatee the absolute interest.

1845.

MORRALL

v.

SUTTON.

The part of the context in the will on which reliance is placed for this purpose is that which immediately follows, by which the testator provides that if *Sarah Calcott* died in the lifetime of the three tenants for life, leaving lawful issue, her children should take the estate; and if without issue, it should go to *Jerginson* and *Morrall*. And this clause, it is said, shews an intention to provide for the issue of *Sarah Calcott*; and in the event which has happened that can only be done by construing the clause in question to give the absolute interest to *Sarah Calcott*, which would enable her to provide for her children by settlement or otherwise, and so give them an indirect benefit.


I admit that if I could find in the context any satisfactory evidence of an intention to provide for the issue of *Sarah Calcott* the younger, either generally or in the event that has happened, that would be a ground for rejecting the latter words, which give her an estate for life, and retaining the former, which give an absolute interest. As for instance, to put the clearest case, supposing the testator in his will had recited that it was his intention to provide for the issue of *Sarah Calcott*, or to enable her to provide for them in any event, that would have afforded a sufficient ground for deciding that the former words expressed the testator's real meaning, and the latter had been introduced *propter incuriam*; and of course, if the same conclusion could be fairly drawn from other parts of the will, which I have supposed to be distinctly expressed in a recital, the same result would follow. But I cannot find in the context any indication of an intention to provide for the issue generally, but only to provide for them in one event; that

1845.
MORRALL
v.
SUTTON.

that is, the death of *Sarah Calcott* the younger during the lives of the three tenants for life. In that event he makes a provision for them expressly, and not by giving an estate to the mother to enable her to do so: and in that event also he gives an interest on the failure of issue to *Jerginson* and *Morrall*; but he gives none to them if *Sarah Calcott* survives the tenants for life and dies without issue. He certainly did not mean to give a contingent benefit in all events to *Jerginson* and *Morrall*, but has made it depend upon the event of *Sarah Calcott* dying before the tenants for life. How can we say that he had not the same intention as to the children? Again, if there had been a general intention to provide for the children by giving the mother the entire estate, why did he not give that estate to her, whether she survived the tenants for life or not? and why does he give an absolute estate to her if she survives, whether she has issue or not? It is perfectly clear that there is no uniform and consistent intention to provide for the issue in all events by the particular mode of giving an absolute estate to the mother.

It appears, therefore, to me to be a mere conjecture that the testator meant a benefit to the issue in the event which has happened. The words of the will in no part are such as to form a legitimate ground for judicial inference that he did. It is not indeed an unreasonable supposition that the testator might mean to enable the mother to provide for her issue if she survived by giving her the entire estate, and introduced the words "for life" by mistake, nor is it, on the other hand, unreasonable to suppose that he meant to give her a life estate only, and that he did not mean in that event to provide for the children at all; nor is it unreasonable to suppose that he meant to give *Sarah Calcott* a life estate, and that the words executors, &c. slipped into the

the will, written by a professional man, in consequence of their usual connection with a gift of personal estate to another, and that the testator forgot to introduce a limitation over in favour of issue, and to *Jerginson* and *Morrall* afterwards. Here are three plausible conjectures. The last is really the most probable; all are consistent with the context: but all of the three suppositions appear to me to be conjecture merely.

1845.

 MORRALL
 v.
 SUTTON.

I am aware that there are many cases in which courts have gone considerable lengths in altering words in order to meet the supposed intention of testators, upon more or less satisfactory grounds; but I cannot help thinking that we shall better perform our duty, the more we bear in mind that it is the province of judges to expound the words which are in the will, to ascertain the meaning of what the testator has actually written there, and not to speculate upon what he might reasonably be supposed to have intended to write, and to mould the language of the will accordingly. It seems to me, that, in attributing an intention to the testator to give *Sarah Calcott* an absolute interest in order to provide for her children, we are pursuing the latter course, and rather making a will for the testator than expounding any already made.

I do not propose to go through the cases of alterations in the language of a will, which have been made to meet the presumed intention of the testator. In some which have been cited the last words have been rejected, the meaning of the testator being clear, and indeed apparent, in the sentence itself. In *Reece v. Steel* (a), where there was a devise "to *C. H.* for life, and to her heirs, the issue of her body, for ever, for their lives,"

(a) 2 Sim. 233.

1845.

MORRALL

v.

SUTTON.

lives," with a proviso containing a devise over if *C. H.* left no issue. It was clear that the testator intended to give *C. H.* an estate tail, and that each heir in tail should take for life; but that intention could not be carried into effect. *Doe dem. Cotton v. Stenlake* (a) was another instance of the same kind: there was no difficulty in either case in ascertaining the testator's meaning, but in carrying it into effect. In *Smith v. Pybus* (b), where an annuity was left to *A.* for life, and after the decease of *A.* to be divided equally between *B.* and *C.* and *D.*, "to them and their heirs, or the survivor of them in the order they are now mentioned," the Master of the Rolls, Sir *W. Grant*, rejected the last words because they had no sense or meaning: and he said the question was, "whether words which had a plain meaning were to be rejected for the sake of words of which you do not see the meaning." None of these cases are like the present. Here the words "for her natural life" cannot be explanatory of the mode in which the testator wishes *S. Calcott* herself and her personal representatives to take; and here also both the expressions are perfectly intelligible, but in their proper sense perfectly inconsistent.

In *Boon v. Cornforth* (c), Lord *Hardwicke* rejected interlined words which were presumably the last written, because they were inconsistent, and repugnant to the whole disposition: and his Lordship thought he had no alternative but that of rejecting those words, or the entire provision. Here there is no such necessity: it is a simple alternative of the rejection of the first or last words, each having a perfectly sensible meaning.

In


(a) 12 *East*, 515.(c) 2 *Ves.* sen. 277.(b) 9 *Ves.* 566.

In many other cases the courts have altered the language of the will to suit the testator's intention, which they have seen in the whole purview of the will, or in the particular sentence. I do not enter into the consideration of these, the principle being admitted. One class of cases is very clearly established : — Where there is a devise in fee, with a limitation over if the devisee die under twenty-one, “ *or* ” without issue, the word “ *or* ” is construed “ *and* : ” the ground is, that the testator, by making the event of having issue a condition of preserving the estate, evidently intends an indirect benefit to such issue by the very devise itself of an estate in fee. The cases are all collected in Mr. *Jarman's* edition of *Powell*, vol. i. 380. note. But in this case I see no proof of intent to benefit the issue by giving the estate to the mother, either in the clause itself or the context: it amounts to a mere conjecture, which may or may not turn out to be true. Nor is the argument derived from the supposed intestacy of the testator as to the remainder, if a life interest only is given, of any avail. There is no intestacy upon this construction, for there is a disposition of the remainder in the residuary clause: and it is no answer to say that this disposition confers a very remote benefit on the issue, for there is no proof of an intention to benefit them in all events.

1845.

 MORRALL
 v.
 SUTTON.

I think, therefore, that the context throws no light on the clause in question, and most certainly that clause is consistent with it. I must therefore decide upon the meaning of the words by the clause itself, acting upon the established rules of construction; and so doing, I think, either that the apparent repugnance may be best explained by understanding the gift to the executors in some secondary and improper sense, for the purpose of giving the executors after death a fruit fallen during life, or (and to the latter course I strongly incline) that

1845.

 MORRALL
 v.
 SUTTON.

the two provisions are absolutely repugnant, and cannot be reconciled at all; and being unexplained by the context, then, according to the rule above referred to, the last provision must prevail.


I therefore conclude that *Sarah Calcott* took an estate for life only in the *Gloucestershire* leasehold estate.

COLERIDGE J.

My Lord Chancellor, — Having the misfortune to differ in opinion with the Master of the Rolls and my brother *Parke* in this case, I cannot state to your Lordship the conclusion to which I have arrived without the greatest distrust of its correctness, as well from that circumstance as from the acknowledged difficulty of the question, and a just diffidence of my own judgment upon any such occasion. It is satisfactory to me to find that on the principles of decision there is no substantial difference between my brother and myself.

The question at issue turns upon the effect to be given to the following clause in the will of *Edward Lloyd*: — “I give, devise, and bequeath my said leasehold estates in *Gloucestershire* (subject to the said several annuities as aforesaid) to *Sarah Calcott* the younger, if she shall be then living, her executors, administrators, and assigns (subject to the said annuities charged thereon), during the term of her natural life.” Having had the advantage of hearing my learned brother’s judgment, I may say at once that I entirely concur with him in the opinion to which he strongly inclines, that no satisfactory interpretation was suggested at the bar, and that none, probably, can be, by which to reconcile the two parts of this sentence — that, in the first place, by which the estate is given to *Sarah Calcott*, her executors, administrators, and assigns, and that, in the second place,

place, by which it is limited to her during her natural life. Upon this part of the case, therefore, I will add nothing.

1845.

 MORRALL
 v.
 SUTTON.

But if these two parts of the sentence cannot be reconciled, it follows that, if any effect be given to the clause, it must be by rejecting one of them. It must be assumed that one of them the testator wrote, or, having written, permitted to stand, unadvisedly; that one of them, in short, does not express his last will. The question then is, which of the two is to be rejected, which is to stand; and it will be very important in the solution of this to remember that it is not an inquiry into the meaning of what the testator has written, but practically to ascertain what it is which he is to be taken deliberately to have written, as his last will,—not a question of construction (for every word in itself is perfectly unambiguous), but an inquiry what is the subject-matter to be construed. I make this remark in the commencement, because it serves to shew that many of the ordinary rules of construction have directly no bearing on this inquiry, and because it may warrant a wider discretion in the Court than it would properly assume on a mere question of interpretation.

To assist the Court in such an inquiry, a general rule has been established, after some controversy. The latter clause or phrase is to be preferred, the former rejected. And if this rule were universal and unqualified in its application, nothing could be more easy, of course, than to act on it: the fact being established — and it would be of simple ascertainment — that the clauses or sentences were repugnant to each other, the decision would be easy, and in all cases uniform. But I think it may be taken as clearly established, that this rule must not be acted on so as to clash with another paramount

1845.



MORRALL

v.


SUTTON.

rule, which is, that before all things we must look for the intention of the testator as we find it expressed or clearly implied in the general tenor of the will; and when we have found that on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last, indifferently: and this rests upon good reason; for although, when there are repugnant dispositions, and nothing leads clearly to a preference of one or rejection of the other, convenience is strongly in favour of some rule, however arbitrary, yet the foundation of this rule, as of every other established for the interpretation of wills, obviously is, that it was supposed to be the safest guide under the circumstances to the last intention of the testator. To consider it merely arbitrary would be unnecessarily to suppose an anomaly in the canons by which wills are interpreted: to make it a rule of evidence is to make it harmonise in principle with them. The first efficient disposition by deed prevails, because it exhausts the power of the grantor; but a testament being ambulatory till the death of the testator, the last expression of his mind must prevail: and if two intentions are expressed in the same testament inconsistent with each other, the former must be presumed to have been abandoned, and must be over-ruled by the latter. But where, in the same instrument, either from recitals over-riding the whole, or from express provisions, it can be collected with reasonable certainty that there was no departure from the original intention, the presumption is rebutted, and the latter clause, as repugnant to a still subsisting intention, must be rejected.

That the conflicting words occur in the same sentence, I admit, has been held to be not a sufficient reason in itself for refusing to apply the rule, and properly. In a case where there is nothing to lead the mind to an
opposite

opposite conclusion, not merely the convenience of a certain rule, but reason, requires that it should be so; for there is evidence, slight indeed, of a change of intention, and nothing to set against it. *Doe v. Biggs* (a) is an authority for this. And on the other hand, where words have been inserted in a sentence by interlineation, and therefore may be presumed to have been last written, these have been rejected, if they were clearly repugnant to the intention of the testator in the whole provision for disposing of that part of his property. *Boon v. Cornforth* (b) is an instance of this. But although I distinctly admit that, in cases where the rule is properly to be applied at all, it will apply to inconsistent clauses in the same sentence as well as to inconsistent sentences in the same will, yet, where the question is, whether it is to be applied, we shall be led more easily, and on slighter evidence, to determine in the negative in the former case than in the latter, simply because the principle on which the rule stands exists in less strength in the former than in the latter case. To suppose a variation of intention between the penning of the former and the latter part of the same sentence is less reasonable than between the framing of different dispositions in the same will. The amount of the difference may vary infinitely. I am not upon the degree, but the principle.

Mr. *Jarman*, in his excellent work on *Wills*, ch. xv., expresses the rule in language which I would wish to adopt, and I cite him the rather because, in the opening of the same chapter, he seems to me to have expressed himself in language which needs qualification. "It is clear," he says, "that words and passages in a will which are irreconcilable with the general context may be rejected, whatever

1845.

 MORRALL
 v.
 SUTTON.

(a) 2 *Taunt.* 109.

(b) 2 *Ves. sen.* 577.

1845.


MORRALL
v.
SUTTON.

whatever may be the local position which they happen to occupy; for the rule, which gives effect to the posterior of several inconsistent clauses, must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein." (vol. i. p. 420.) I believe that up to this point there is no material difference of opinion between my learned brother and myself (not, of course, that I presume upon his acquiescence in every argument or illustration which I have used); still, with a view to what follows, I have thought it necessary to state this preliminary matter thus fully.

Whether, then, the rule is to be applied or not, must in every case depend on the evidence of intention supplied by the will itself; and the practical difference between us is as to the amount of evidence which should be sufficient to take a case out of the rule. The question here being whether *Sarah Calcott* took an estate absolute or only for life, it is conceded, I believe, that if an intention can be clearly collected from the context, either to provide for her children generally or in some specified event—the event which has happened—we ought to retain the words, however placed, by which alone that intention can be effectuated, and reject those which will absolutely defeat it. But it is assumed, that, from clear provisions for the children in certain events, no inference can be drawn of an intent to provide for them generally, or in the event which has happened, and therefore that such provisions will have no effect in preventing the application of the rule. This, I own, seems to me to narrow the ground in a way for which I find no authority, and in itself unreasonable.

sonable. Suppose the testator had anxiously provided for the children in three, four, or more possible contingencies, I should have thought that a ground from which an inference might have been drawn of an intention to provide for them in a fifth which had arisen, but had not been specified in the will; a ground strong enough at least to determine my election between two inconsistent clauses, one of which was so worded as to carry that intention into effect, the other to defeat it, though I should not have felt warranted from it in supplying such a clause if not found in the will. For it must never be lost sight of, that this is not a case of introducing words into a will to carry into effect a presumed intention. You have all the words required for your purpose, clear and unambiguous. The question is only, whether they are to be retained or rejected by reason of repugnant words following. That question, it is agreed, must be determined by the context. If from the context you can gather nothing as to the testator's intention, I admit the technical rule must prevail. But on what principle is it required, on the other hand, that conclusive evidence of intention, expressly embracing every contingency, should be adduced, before the rule can be rejected? If, indeed, the question were whether a particular devise or bequest, not expressed, should be supplied from evidence of intention, I could understand the argument that such an inference could not be drawn merely from the intent to give some interest under other circumstances than those which had actually arisen. But this is not that case. Further, I agree, that even in a case like the present, where it is not a question of supplying but rejecting words, that which amounts to no more than a mere guess ought not judicially to influence the mind at all; it should be considered as nothing; but that a canon so strict as that referred to cannot be the true one, may, I think, appear

1845.

MORRALL
v.
SUTTON.

1845.

MORRALL


v.

SUTTON.

appear from this consideration alone: if the latter words be rejected, the first must stand. Suppose then evidence of intention to be gathered from the context, inconsistent with the latter, and yet not pointing specifically to the former at all, still, on this evidence, the former must surely be supported, simply because the latter must be rejected. Suppose, for example, the question to be between words giving an estate tail and an estate for life, and the context only to shew clearly that there was no intention to devise for life only, but to contain nothing from which that particular estate of inheritance, the estate in tail, could have been inferred, still you would remove the words giving the estate for life, and by so doing those which gave the estate in tail would be established. I apprehend, then, that as the rule itself is a rule of evidence, so the considerations which determine on its application or rejection must be cogent, but need not be conclusive; and that it is enough to shew the general tenor and context to be inconsistent with the latter words without also shewing that they point precisely to the provisions in the former, if they are not at variance with them.

From the nature of the thing it is impossible to define with strict mathematical accuracy the degree of cogency in the evidence which will warrant the Court in rejecting the technical rule; but for practical purposes we may come near enough by authorities in the cases most closely analogous: and I should say that the Court would be warranted most clearly and *à fortiori*, wherever the evidence is such as would warrant it in transposing clauses, altering words, or supplying devises unexpressed. I specify these because they go beyond mere construction; they either alter or add to the written will upon the ground of a clearly manifested, though ill or imperfectly expressed, intent. It would

would be easy to multiply citations of cases under each of these heads; but I have already trespassed so long on your Lordship's patience, that I will cite but two to illustrate the principle to be collected from them, which I conceive to be this: that, in order to do these strong acts, courts have not thought themselves bound to require evidence of *necessary, inevitable* cogency, but only that which made the intention highly probable, which shewed the will as it stood to be very unreasonable, and the alteration or addition necessary to make it, in legal reasoning, reasonable and consistent. An intention in the testator to be consistent with himself is always assumed as a cardinal point in construction. Thus, in *Soulle v. Gerrard* (a), the devise was "to my son *R.* and his heirs for ever, and if *R.* dies within the age of twenty-one years, or without issue, then over." *R.* had issue *Mary*, and died within age. It was resolved that "or" should be construed "and," and that *Mary* should take. Here there was nothing impossible in the testator's making the inheritance to depend on two several contingencies: it might be his caprice that the estate should go over if either of two possible events should happen, both of which were clearly present to his mind, and he had expressed himself quite unambiguously to that effect. But the Court looked to the consequences: they would not suppose in the testator a caprice so inconsistent with the general intent apparent to give *R.* an estate of inheritance if he left issue of his body to take it, and therefore they read the will as if the testator had united the contingencies. It is well known that this has become a settled rule, and numberless wills have been construed in accordance with it. *White v. Barber* (b) is a case perhaps more analogous to the present. There the testator, having one son *T. P.* living at

1845.

 MORRALL
 v.
 SUTTON.

(a) *Cro. Eliz.* 525.


(b) 5 *Burr.* 2703.; *Ambler*, 701.

1845.

MORRAIL
v.
SUTTON.

at the time of making his will, devised to his wife until *T. P.* attained twenty-one, and then to him in fee. But if his wife should be *enceinte* with one or more children at the time of his decease, and *T. P.* should die without issue before twenty-one, such child or children then living, then he devised to his wife until they attained twenty-one, and then to such children in fee; but if *T. P.* should die without issue, and before twenty-one, or that such posthumous children, if any, should die without issue, and before twenty-one, then to his wife for life, remainder over to his nephews in fee. Here was a most careful provision for the living child, and for any posthumous issue; but the case of children born in his lifetime, after the will made, was wholly overlooked. Two such were born, and more than five years after the date of the will the testator died, not leaving his wife *enceinte*; and then *T. P.* died a minor, and without issue: upon a case out of Chancery the Court of Queen's Bench certified that the two younger children would take under the will an estate in fee at their respective ages of twenty-one. Here it might have been said, what evidence of any intention to provide for after-born, because there was an intention to provide for living and posthumous, children? It is a distinct class: still less what evidence of an intent to give the second and third child a joint estate in fee when the eldest was to take alone, and the posthumous, if more than one, must have been twins, which might explain why they were to take jointly? There certainly was no conclusive evidence, but the Court thought that a father who took such anxious care for posthumous children as to make an express provision for them could never intend to give them his estate in exclusion of, or to his nephews in preference to, any child or children that might be born in his lifetime. They, therefore, not only supplied a devise, but framed it in a special manner to meet the supposed

supposed intent, which they gathered from the will upon moral evidence, highly probable, but falling very far short of demonstration.

1845.

 MORRALL
 v.
 SUTTON.

To apply now these principles and authorities to the present case, and see what the evidence is against the intention to limit *Sarah Calcott's* estate to her for life. In the first place, that involves in a certain event an intestacy, at least the contemplation of it in the testator's mind, as to this a considerable and much considered part of his property. For although the words of the residuary clause may be large enough to include it, yet no one who reads that clause, and considers the trusts there limited, will believe that the testator ever contemplated the possibility of this property falling under it. Now beyond the general presumption against an intention of intestacy, the anxiously minute details of the whole will seem to me to exclude the notion of this case absolutely; and with regard to this particular property, the testator seems to have separated it from the rest, to have provided for the transmission of it under every contingency; and instead of intending that it might come to sale under the residuary clause, he is evidently anxious that the lease should be constantly renewed, and has provided accordingly.

Next, it is clear that *Sarah Calcott* the younger and her issue, if she should have any, were near objects of his bounty, and that substantially and specifically he meant to provide for them by these leaseholds; accordingly, after the death of three persons (one of them her mother) she is to take; but she might die before them and leave issue: in that case, and if such issue survive the tenants for life, they are to take absolutely; and if any child should die before the tenants for life, leaving
 issue

1845.


 MORRALL
 v.
 SUTTON.


issue who should survive them, such issue is to take the parent's share absolutely. Here, then, if the mother never takes at all, is the most abundant care that her issue, if any, shall take the entire interest.

Next, the ultimate remaindermen are, expressly, only to take in case *Sarah Calcott* should die before the tenants for life, leaving no issue; so that if she had lived and taken the property, and then died leaving issue, the judgment of the Master of the Rolls would have defeated not only such issue, but the ultimate remainders over: so far is clear. But if she survives and comes to the property, what estate will she take? There are two sets of words descriptive of her estate: according to the former she will take absolutely; according to the latter only for life; one set must be rejected. If you reject the former, upon her death her children are left unprovided, and the remainders over are also defeated; and there is virtually an intestacy as to the property in question: and although both the children and the remaindermen must have been present to the testator's mind, and the same provisions were necessary to secure their interests, and prevent intestacy, whether she died before or after taking the property, they are wholly omitted in the latter case, though so carefully made in the former. On the other hand, if you reject the latter words, it is true that no specific provisions are made for the children, but they become unnecessary, because their interests might well be left to the care and under the control of the parent. This is so common a mode of providing for children as a class, that the absence of an independent limitation to their use weighs almost nothing. And as to the remaindermen, by the supposition there would then be no need to provide for them.

Let

Let us now apply the reasoning which governed the Court in *White v. Barber* to these facts. Could the testator intend that these children should take all if the mother did not live to come to the property, but nothing if she did? Would he carefully provide to secure the property from the residuary clause, in favour of the children and remaindermen, if she did not come to it; and although there might be the same children and same remaindermen, was it to be thrown into the residue if she did? Whether she never came to the property and died issueless, or came to it as tenant for life and died with issue, would be the same thing, as to the necessity for an ulterior disposition of the property. Why should a remainder be provided in the one case and not in the other?

The respondents would find it difficult to answer these questions satisfactorily; and if so, it seems to me (and I say it with diffidence), no argument, to assert that you cannot infer an intention to provide for the children in one event, from an expressed intention to provide for them in another, or to provide for them in every event, from an intention to provide for them in one; I agree that from these premises simply you cannot infer those conclusions. But this seems to me not the correct way of stating the question. Two sets of words are used; one must be rejected: take the one, and the will is reasonable and consistent; in the doubtful parts it becomes what from the undoubted you could have expected to find it: take the other, and it is exactly the reverse: Why then reject the former? simply because it was first written, and the testator must be taken to have changed his intention before he wrote the latter. The reply is, that these particulars above relied on rebut the presumption of any such change, and, further, as these particulars

1845.

 MORRALL
 v.
 SUTTON.

1845.
MORRALL
v.
SUTTON.

ticulars are themselves set down *after* the words which give the estate for life, no change of intention can be supposed inconsistent *with them*, for this turns the argument for the rule from mere position against it.

For these reasons, with all the diffidence which I expressed in the commencement, I humbly state my opinion that *Sarah Calcott*, under the bequest in question, took an absolute interest in the leasehold estates ; and I deeply regret, that by this difference in opinion from my brother *Parke*, I may to the extent, however limited, to which my reasons may seem deserving of attention, have increased rather than diminished the difficulty of the decision ; but your Lordship and the parties have a right to the expression of the best opinion which I can form.

The LORD CHANCELLOR, after thanking his learned brothers for their assistance, said, that in consequence of their difference of opinion, it became necessary for him to consider what course ought to be adopted, with a view, if possible, to save the parties the expense of an appeal to the House of Lords. He considered the present state of things analogous to that in which, upon a case stated for the opinion of a court of law, the court was equally divided, and no certificate therefore returned, in which case it would be a matter of course to refer the question to another court of law. The only reason, he understood, why the Master of the Rolls had not adopted that course in the first instance, was because he found it impossible to send a case in such a form as not to prejudice some of the arguments on one side or the other. Under those circumstances, he proposed acting upon the analogy to which he had referred, to request the assistance of the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer,

chequer, and to have the case re-argued in their presence.

1845.

MORRALL

v.

SUTTON.

The Reporter has been informed that the suit has since been compromised.

OLDFIELD v. COBBETT.

Feb. 14.

THE Defendant, being in contempt for want of an answer, was taken, under a Commission of Rebellion, and lodged in *Whitecross* prison, from whence he was brought up by *habeas* to the bar of the Court of Exchequer and turned over to the *Fleet*; after which several other detainers were lodged against him. He subsequently put in his answer, but did not pay the costs of his contempt. Some months afterwards the Plaintiff replied to the answer, and served the Defendant with a *subpoena* to rejoin.

Where a Defendant, who is in custody under process of contempt, for want of an answer, puts in his answer, the Plaintiff, by replying to the answer, waives the contempt, and entitles the Defendant to his discharge, without payment of costs.

The Defendant now moved, in person, before the Lord Chancellor, that he might be discharged from custody under the order of commitment, on the ground, amongst others, that the Plaintiff had, by replying to the answer, waived the contempt; *Haynes v. Ball.* (a)

Mr. *Wakefield*, *contra*, drew a distinction between the case of a Defendant being merely in contempt for want of an answer, and that of a Defendant actually in custody for such contempt. It was true that in the former case,

(a) 5 *Beav.* 140.

1845.

 OLDFIELD
 v.
 COBBETT.

case, the Plaintiff, by accepting the answer and replying to it, waived his right to enforce payment of the costs by the process of contempt; but it did not follow that in the latter case the Defendant was entitled to be discharged out of custody without first paying the costs: and he contended that the practice was the other way. *Anonymous* (a), *Smith v. Blofield* (b), *Const v. Ebers* (c).

The LORD CHANCELLOR.

None of the cases cited by Mr. *Wakefield* establish the distinction for which he has contended: for they only shew affirmatively that the acceptance of an answer is a waiver of the right to recover the costs under the process of contempt; but they do not shew negatively that it is not such a waiver of the contempt altogether as to entitle the Defendant to his discharge where he is in actual custody. The *Anonymous Case* in *Vesey* certainly has a tendency to that conclusion; but it is too vague to be relied on. On the other hand, *Haynes v. Ball* (d) is an express authority the other way. And Mr. *Wakefield* had nothing to say to that case, except that it was not law. But there is another case of *Smith v. Campbell* (e), in which the point arose. That indeed was an *ex parte* application: but from the nature of the application the attention of the Court was particularly drawn to the point, and it occurred to no one to take the distinction now insisted on by Mr. *Wakefield*. Out of respect, however, for that learned gentleman's opinion, I have referred to the Clerks of Records and Writs as to the practice, and they have returned me this certificate: —

“ That where a Defendant is in contempt for want of answer (whether in custody or otherwise), and he afterwards

(a) 15 *Ves.* 174.

(b) 2 *V. & B.* 100.

(c) 1 *Madd.* 530.

(d) 5 *Beav.* 140.

(e) 1 *Russ. & Myl.* 323.

wards files his answer, to which the Plaintiff replies, such Defendant is thereby entitled to be discharged from his contempt without payment of the costs thereof."

1845.

 OLDFIELD
 v.
 CORBETT.

I think, on the express decisions to which I have referred, and this certificate, I must consider that what has taken place amounts to a waiver of the contempt, and that with respect to this order of commitment the Defendant is entitled to be discharged without payment of costs. The Defendant has on former occasions moved to discharge that order for irregularity, and those motions have been refused with costs. What I now do will not affect those orders.

In the Matter of the WARWICK Charities.

March 14.

THE LORD CHANCELLOR, in this case, said, that in petitions for filling up vacancies in the number of trustees of charities formerly vested in corporations, it was necessary to obtain the Attorney-General's fiat to the petition, as being presented under Sir S. Romilly's Act, as well as under the Municipal Corporation Act; but that it was not necessary to serve the Attorney-General; adding, that if in the course of the discussion any thing should occur which might make it desirable to have the presence of the Attorney-General, the Court might direct that he should be served.

Petitions for filling up vacancies in charity trustees require the fiat of the Attorney-General, but need not be served upon him.

Mr. Wakefield, Mr. James Parker, and Mr. Blunt, were counsel in the case.

1845.

March 14. In the Matter of the GREAT WESTERN RAILWAY *Ex parte* MARSHALL.

The costs of an application for the transfer out of Court of a sum of stock, the produce of land taken by a railway company under the powers of their act from a party under disability, held, upon the construction of the act, to be payable by the company.

THE petitioner was a tenant in tail, whose land had been taken during his infancy by the Railway Company under the powers of their Act (*a*), and the purchase money paid into Court, and invested. The petitioner being now of age, and therefore absolutely entitled to the money, prayed by his petition that the stock might be transferred to him, and that the Company might pay the costs of the application.

Mr. Neate appeared in support of the petition.

Mr. Osborne, *contra*, referring to the thirty-sixth section (*b*), contended that the Act did not provide for

(*a*) 5 & 6 W. 4. c. cvii.

(*b*) "And be it further enacted, that where by reason of the disability or incapacity of any person or corporation entitled to any lands, tenements, or hereditaments to be taken under or by virtue of this Act, or from any other cause whatsoever, the purchase money for such lands, tenements, or hereditaments, or any money to be paid for or by way of compensation or satisfaction for any injury or damage done to the same, shall be required to be paid into the Bank of *England*, and be subject to the orders and directions of the Court of Exchequer, under the provisions contained in this Act, it

shall be lawful for the said court to order all the reasonable costs, charges, and expenses attending such purchase, taking, or using of any lands, tenements, or hereditaments, or which may be incurred in consequence thereof, and also of the investment of the purchase or compensation money paid in respect of such lands, tenements, and hereditaments in real or government securities, and likewise of the re-investment of such purchase or compensation money, or the government and real securities purchased therewith, in the purchase of lands, tenements, and hereditaments, as hereinbefore mentioned, together

for the costs of getting money out of Court, except where the object was to reinvest it in the purchase of other land; and that on a similar application before the Vice-Chancellor of *England* in the matter of the same Railway, where the same objection had been taken, his Honour had held that the Court had no jurisdiction in such a case to give costs.

1845.

In re
 The GREAT
 WESTERN
 Railway
 Company.

The LORD CHANCELLOR.

I think the case comes within the express terms of the Act, which are very general; and that construction is consistent with the justice of the case; for where a public company takes a person's land without his consent, for their own purposes, it is right they should pay all the expenses incident to it.

ther with the costs, charges, and expenses of obtaining the proper orders, and of all other proceedings for such purposes, and of the payment of the dividends and interest of the said government or real securities, and of the payment of the principal of the said purchase or compensa-

tion money, and of the government or real securities purchased therewith, out of Court, to be paid by the said company, and the said company shall from time to time pay such sums of money for the said costs, charges, and expenses as the said court shall direct."

1845.

April 11.

In the Matter of CLARKE and Others, *Ex parte*
BUCKLEY.

On the hearing of an appeal upon a special case from the Court of Review, the Lord Chancellor may direct a case to be stated for the opinion of a court of law.

The decision in *Hall v. Smith*, 1 B. & C. 407., questioned.

THIS was an appeal, by way of special case, from the Court of Review.

The bankrupts were the late partners in the *Leicestershire* Bank. The appellant was the holder of several of these notes, which were in the following form: —

“ *Leicestershire* Bank.

5*£*.

“ I promise to pay the bearer on demand five pounds here, or at Messrs. *Williams, Deacon, Labouchere, Thornton*, and Co., bankers, *London*, value received.

“ For *John Clarke, Richard Mitchell, Joseph Philips, and Thomas Smith. Richard Mitchell.*”

Upon one of the notes so signed the appellant tendered a proof against the separate estate of *Richard Mitchell*, which the Commissioner admitted, but on appeal to the Court of Review it was set aside. This was an appeal from that decision.

Mr. *Russell* and Mr. *Daniell*, for the appeal, relied on *Hall v. Smith* (a) as exactly in point, observing that the authority of that case had been recognised by Mr. Justice *Bayley*, one of the judges by whom it was decided, in a subsequent edition of his work *On Bills* (b), which, though published by his son, was well known to have been revised by himself. They cited, also, *Sayer v. Chaytor* (c), *March v. Ward* (d), and *Lee v. Nixon*. (e)
Mr.

(a) 1 B. & C. 407.

(b) 5th Ed. p. 51. n.

(c) 1 Lutw. 696.

(d) *Peake's N. P. C.* 130.

(e) 1 Ad. & Ell. 201.

1845.

In re
CLARKE.

Mr. *Hill* and Mr. *Chapman*, *contra*, said that the doctrine of *Hall v. Smith*, though it had never been judicially overruled or questioned, had not been practically acted upon; for that the form of the note was precisely the same as that of the notes of the Bank of *England* (in proof of which they produced one): and yet no one ever supposed that the cashier of the Bank of *England*, who signed for the governor and company, thereby made himself personally liable. The true construction of such a note, and that which was notoriously the understanding of the parties, was — not, “I promise to pay so much for *A. B.* and *C. D.*,” but “I promise, for *A. B.* and *C. D.*, to pay so much.” They also referred to *Story on Partnership* (p. 223. note), where the learned author, in commenting on *Hall v. Smith*, observes that it went to the very verge of the law, and might perhaps be thought to deserve further consideration.

In the course of the reply,

The LORD CHANCELLOR asked whether there was any instance, since the establishment of the Court of Review, of the Lord Chancellor having, on the argument of a special case from that Court, directed a case to be stated for the opinion of a court of law: which question having been answered by Mr. *Russell* in the negative,

His Lordship said, he conceived that he had the same power to do so, when sitting in bankruptcy as in other cases; and that he thought that would be the proper course in the present case, as he should feel great difficulty, sitting here alone, in overruling a decision of the Court of Queen’s Bench; and yet, with great respect for the authority of *Hall v. Smith*, he still retained the impression which he had at the outset, that this was a joint promise only. And as that was also the

1845.

In re
CLARKE.

view taken of it by the learned Judge (*a*) of the Court of Review, from whom this appeal had come, and the practice of the Bank of *England* appeared to be in conformity with it, he should hesitate, on the other hand, to act on the authority of that case.

(*a*) Sir G. Rose.

April 14.

In the Matter of the KING'S GRAMMAR SCHOOL
in the Borough of WARWICK.

And in the Matter of the 52 G. 3. c. 101.

And in the Matter of the 3 & 4 VICT. c. 77.

In settling a scheme for a grammar school, where the Head-master is to be a graduate of *Oxford* or *Cambridge*, and in holy orders, the Court will give no specific directions as to religious instruction or discipline, but will leave the details of both to the discretion of the Head-master.

Restrictions imposed on the master of a Free Grammar School as to holding ecclesiastical preferment.

THE school in question was a free school, which was founded and endowed by a charter of King *Henry VIII.*, in the thirty-seventh year of his reign, "to the end, that the young subjects of his kingdom in the county of *Warwick*, might thereafter be instructed in useful and ornamental learning." Several additions were subsequently made to the endowment from private benefactions. In the year 1838, the school having become inefficient in consequence of the limited course of instruction carried on in it, and other causes, it was referred to the Master to approve of a scheme for its future conduct and management, with liberty to approve of a plan for adding instruction in commercial and general education to instruction in grammar and other learning fit to be taught in a grammar school.

The Master having made his report, this petition was presented by the trustees of the municipal charities of the borough of *Warwick*, praying, amongst other things, that the scheme which the Master had approved might be confirmed, with certain alterations.

The

The petition now came on to be heard, all parties consenting that the questions arising upon the scheme should be decided by the court in this form, instead of upon exceptions to the report.

1845.

In re
 The KING's
 GRAMMAR
 SCHOOL,
 WARWICK.

The scheme provided, in the first place, that the master should be a graduate of one of the universities of *Oxford* or *Cambridge*, and in holy orders, and that he should be at liberty to take thirty boarders, giving the preference to boys whose parents were resident in the county of *Warwick*: That an usher or under-master should be appointed by the master, who should be competent to teach as well the classics as mathematics, and the higher branches of arithmetic, and should be well versed in modern literature, geography, and science, and should be a fit person in his habits and temper to have the charge of education.

By the sixth clause of the scheme it was provided, that the head master should reside on the premises called the College in the borough of *Warwick*, and that the under master should reside in the borough of *Warwick*, and that neither of them should hold any ecclesiastical appointment, having cure of souls or other appointment having weekly duties attached thereto, or which would require any part of their attention during the week days: but that either of them should be at liberty to hold within the town of *Warwick*, or within five miles thereof, any lectureship, chaplaincy, or other appointment, the duties of which would not interfere with their, or one of them, attending divine service on the morning of *Sunday*, with such of the boys of the school, either boarders or otherwise, who should attend the same.

With respect to that clause,

Mr.

1845.

In re
The King's
GRAMMAR
SCHOOL,
WARWICK.

Mr. *Rolt*, who appeared for the the petitioners, stated that all parties were desirous that the masters should be at liberty to accept ecclesiastical preferment, provided it did not interfere with their attention to the school; and he, therefore, proposed that the prohibition in the first part of that clause against the master's holding such preferment should be qualified by the insertion of the words, "unless he or they should be excused from residence by the proper authorities."

The LORD CHANCELLOR said he saw no objection to that, except that the words inserted should be "unless and for so long only as he or they should be," &c. But to the latter part of the clause his Lordship said he had a decided objection, as it would admit of the master's holding a lectureship at *Leamington*, within two miles of *Warwick*, which would leave the boys unprotected during *Sunday*. Therefore the words "or within five miles" should be omitted, and there should be an express prohibition against either of the masters holding any lectureship, chaplaincy, or other such appointment as therein mentioned, elsewhere than in the town of *Warwick*.

By the seventh clause it was provided, that during one hour at least of every school day, the head-master or under-master should give religious instruction, to be confined to the reading and explaining of the Scriptures; and on every Lord's day only, the said head-master or under-master should give instruction in the Liturgy, Catechism, and Articles of the Church of *England*, to such of the boys whose parents were in communion with that church, and to such of the boys whose parents or persons standing to them *in loco parentis* did not object to their receiving such instruction. And the eighth clause provided, that the head-master should see that all
the

the day scholars regularly attended divine service according to the rules of the Church of *England*, once or oftener on *Sundays* and *Good Friday*, and that they should assemble together at the school, and proceed, under the care and superintendence of the head-master or of the under-master, to the parish church, or some other church or chapel where the service of the church of *England* was performed.

1845.
In re
The King's
GRAMMAR
SCHOOL,
WARWICK.

With respect to these clauses,

Mr. *Rolt* said, they had been introduced by the Master contrary to his own judgment, and to the wishes of all parties in the town, in deference to the authority of two cases recently decided by Vice-Chancellor *Knight Bruce*, *The Attorney-General v. Cullum (a)*, and *Attorney-General v. Lord Carrington (b)*, in which similar directions had been given. He insisted, however, that these were the only instances in which such regulations had ever found a place in a scheme for a grammar school, and that in the town of *Warwick*, where there were many dissenters as well as Roman Catholics, it would tend greatly to narrow the usefulness of the school, if a regulation partaking so much of an exclusive and sectarian spirit were adopted.

Mr. *Wray*, for the Attorney-General, insisted on both the clauses being retained, stating that all the old schemes contained similar provisions.

The LORD CHANCELLOR.

I think it is better to omit both clauses, not on the ground that religious instruction is not to be required (for I assume as a matter of course that it will be given),
but

(a) 1 Y. & Coll. C. C. 411.

(b) Not reported.

1845.

In re
The KING's
GRAMMAR
SCHOOL,
WARWICK.

but because, when I find that the head master is to be a graduate of one of the universities and in holy orders, and the under-master to be appointed by him, it seems to me better to leave every thing relating to religious instruction to his discretion: I think it much better for the establishment, and much better for religion, to do so than to give any specific direction with respect to it.

Mr. *Hetherington* appeared for the Head-master.

Mr. *Bayley*, for the Corporation of *Warwick*.

April 16.

BAMPTON v. BIRCHALL.

If, after a demurrer has been put in to a bill, the suit becomes abated, the bill filed to revive it must be limited to that object; if it prays any further or additional relief, a demurrer lies to the whole bill, and not to that part only which relates to such additional relief.

THIS was an appeal from an order of the Master of the Rolls, allowing a general demurrer to a bill of revivor and supplement.

The material allegations of the bill are shortly stated in the Lord Chancellor's judgment. The argument was substantially the same as in the Court below. (a)

Mr. *Wakefield* and Mr. *Bilton*, for the appeal.

Mr. *G. Turner* and Mr. *Elmsley*, *contra*.

The LORD CHANCELLOR.

The question in this case was, whether the demurrer, which was to the whole bill, could be sustained.

The facts were these: — Sir *Frank Standish* died in 1812, seised of certain real estates, which came on his death

(a) 5 *Beav.* 330.

death into the possession of *Frank Hall Standish*. *Thomas Standish* claimed to be the heir-at-law of Sir *Frank Standish*. *Blackburn*, who was the assignee under his insolvency, brought an ejectment against *Frank Hall Standish*, and filed a bill, stating the pedigree, and that some terms were outstanding, and praying an injunction against setting them up in the action. To that bill there was a general demurrer, the effect of which was to suspend all the proceedings in that suit until the demurrer was disposed of. The demurrer was not set down for argument, and the proceedings were suspended for eight years: in the meantime both the Plaintiff and the Defendant in that suit died. *Frank Hall Standish* devised the estates to the present Defendants, and the present Plaintiff was appointed assignee in the place of *Blackburn*. That was the state of things in 1840. Nothing could be done till the original demurrer was disposed of: for that purpose a bill of revivor and supplement was necessary, and for that purpose only. This bill, however, is not merely for the purpose of revivor. It alleges, first, that the ejectment in which the original bill was founded had become abated by the death of the Defendant in that suit — not abated in the sense of the term as used in this Court, but in the sense in which it is used at law. It then alleges that another ejectment had been brought by the present Plaintiff, and that the Defendants meant to set up outstanding terms in answer to that action, and it prays an injunction to restrain them from so doing. It further alleges, that the present Defendants had on various occasions admitted the Plaintiff's title. All this was matter for a new original bill; but it is nevertheless mixed up with matter for a bill of revivor. It was insisted, on the part of the Defendants, that there was no precedent for such a bill, in answer to which, however, it was contended, that, supposing that to be the case, the demurrer ought not to

1845.


BAMPTON.
v.
BIRCHALL.

1845.

BAMPTON
v.
BIRCHALL.

to have been general, but confined to the matter which was not proper for a bill of revivor. But I think that is not correct. The bill was irregular, contrary to the practice of the Court, and a vicious proceeding altogether. Try it by this test. Suppose this demurrer overruled and the other allowed. What would be the state of the record? The original bill would be out of Court, and there would be a bill of revivor without any original bill to which it might relate. I think, therefore, the demurrer was properly allowed. The apparent object was to connect this with the other bill, in order to avoid the Statute of Limitations. That, however, cannot be done in this manner. If the party has a right to file a new bill, he should do it in the regular way.

Appeal dismissed with costs.

April 16.

In the Matter of the 4 & 5 W. 4. c. 29.

Ex parte Lord WILLIAM PAWLETT.

Under the 4 & 5 W. 4. c. 29. a trust to invest money in real securities in England or Wales or Great Britain, will authorize an investment on real securities in Ireland also: and though the money be already in-

A LARGE sum of money was bequeathed by a will to trustees, in trust for the petitioner for life, with remainder to his eldest or other son who should first attain twenty-one; and in default of such issue, to Lord Harry Vane for life, with like remainder to his eldest or other son who should first attain twenty-one; and in default of such issue to the Earl of Sandwich.

Neither the petitioner nor Lord Harry Vane had any issue.

The

vested in Great Britain, the Court will, on the application of the tenant for life of the fund, direct a reference to the Master to inquire whether it will be for the benefit of all parties interested that that investment should be changed for one at a higher rate of interest in Ireland.

The petition prayed a reference to the Master, to inquire whether it would be for the benefit of the parties interested under the will, that a sum of 52,000*l.*, part of the trust fund, should be invested on the security of certain real estates in *Ireland* at 4 per cent., the will authorizing, in terms, only an investment on government or real securities in *England*.

1845.

Ex parte
 Lord
 W. PAVLETT.

Mr. *James Parker* and Mr. *Shadwell* for the petition, said, that the Vice-Chancellor of *England* had made a similar order to that now asked in *Ex parte French* (a), and several subsequent cases, but that the Master of the Rolls had refused to do so in *Stuart v. Stuart* (b) (where the fund was invested in consols), on the ground that the direction in the will to invest in *England or Wales* was a strong argument that the testator did not intend it should be laid out elsewhere, and that though it might be for the benefit of the tenant for life to change the existing security for one which would yield a higher rate of interest, it could not be for the benefit of those in remainder to take the fund from an investment where it was safe, for the purpose of placing it in one which was less secure. It was in consequence of that conflict of authority that the present application had, at the request of the trustees, been made to the Lord Chancellor.

The LORD CHANCELLOR made the order, saying that, since the act of parliament, *England* and *Wales* must for this purpose be taken to include *Ireland*, and that it was not to be assumed that the parties in remainder were not interested, as well as the tenant for life, in investing the money upon a security which would yield a higher rate of interest: for if it remained there long enough, they would have the benefit of it.

Mr.

(a) 7 *Sim.* 510.

(b) 3 *Beav.* 430.

1845.

Es parte
Lord
W. PAWLETT.

Mr. *Stinton*, who appeared for the trustees, objected that Lord *Harry Vane* and Lord *Sandwich* had not been served with the petition.

The LORD CHANCELLOR, however, held that that was not necessary, and that it was sufficient to serve them with the order and the warrants to attend the Master.

June 26.
July 2.

BRUIN v. KNOTT.

The allowance to which a mother who has maintained her orphan child is entitled, after the death of the child, out of the accumulations of its fortune, is limited to what she has actually expended upon such maintenance, though such expenditure should have been less than what the amount of the child's fortune would have justified; and the allowance ought to be paid out of that part of the child's fortune which it would have been most for the benefit of the child, if living, to have applied for that purpose.

IN October 1823, *Joseph Aldridge*, a citizen of *London*, died intestate, leaving a widow and three children. By the custom of *London*, one third of the residuary personal estate of the intestate, which was of large amount, belonged to his widow as such, another third to her as administratrix, and the other third to the children, in equal shares, with benefit of survivorship among them in the event of any dying under twenty-one. Two of the children died successively under twenty-one, *Joseph*, the child who died second, having attained eighteen, and made a will, by which he bequeathed all his property to his mother. On his death, this bill was filed by *Sarah Bruin*, the surviving child, and her husband, against the intestate's widow, who had married again, and her second husband, praying, amongst other things, that the Plaintiff, *Sarah Bruin*, might be entitled to the shares, as well original as by survivorship, of the child who died last, together with the accumulations on such shares respectively. The Defendants by their answer stated that *Joseph* had

had been maintained and educated by his mother from his father's death until his own death, and they claimed to be reimbursed the amount of the expences of such maintenance and education out of the fund in dispute, in case the Court should be of opinion that they were not entitled to the whole.

1845.

 BRUIN
 v.
 KNOTT.

It appeared that *Joseph*, the child who died last, was entitled absolutely to other property, both real and personal, to a considerable amount.

Upon the hearing of the cause before the Vice Chancellor of *England* (a), two questions were referred to the Court of the Mayor and Aldermen; first, Whether the share, which an orphan may have taken by survivorship, itself survives on his death under twenty-one, as well as his original share; and, secondly, Whether, if there be an accumulation of interest on an orphanage share, the accumulation survives in the same manner. That Court having answered both questions in the affirmative, the cause came on again upon the equity reserved; when the Vice Chancellor, after making a declaration in conformity with the prayer of the bill, referred it to the Master, to enquire and state what sum would be proper to be allowed for the maintenance of *Joseph Aldridge* from the death of his father to his own death, having regard to the whole of his fortune, with liberty to the Master to state special circumstances. From that part of the Vice Chancellor's order the Plaintiffs appealed.

Mr. *Tinney* and Mr. *Parry* appeared for the Appellants.

Mr.

(a) 12 Sim. 436.

VOL. I.

Q q

1845.

BRUM

v.

KNOTT.

Mr. Stuart and Mr. Collins for the Respondents.

On the part of the Appellants it was contended, first, That the Defendant was at most entitled only to be reimbursed what she had actually expended upon the maintenance of her child, and consequently that the enquiry ought to have been what had been properly expended upon the maintenance, not, what would be proper to be allowed for it; and, secondly, that if the scale of expenditure which it would be proper to allow was to depend upon the whole amount of the infant's fortune, and not on the orphanage share alone, justice required that it should be defrayed rateably out of the orphanage share and the other property, to which he was entitled, and that an enquiry ought therefore to have been directed as to the amount of such other property.

On the other hand, it was insisted that the Vice Chancellor's order was right upon both points: that, as to the first, if the enquiry was directed in the form suggested by the Appellants, it would throw upon Mrs. Knott the onus of proving by vouchers every payment she had made on account of her child for a period of fourteen years, which, from the nature of the case, it was impossible for her to do. On the second point, they relied on *Willoughby v. Foljambe (a)*, and *Rawlins v. Goldfrap (b)*.


The LORD CHANCELLOR.

The Vice Chancellor seems to have proceeded upon the same principle as if this had been a question of prospective maintenance: I do not think, however, that that is the right principle, with reference to past maintenance.

(a) 2 Sim. & Str. 65.

(b) 5 Ves. 440.

tenance. I see no reason why a party who has maintained a child without the order of the Court should be allowed more than she has actually expended. In lunacy the case occurs every day, and the enquiry always is, what sum has been properly expended. It does not follow, however, that the mother is to be put to the proof, by voucher, of every item that she has expended on account of her child, who has lived with her. That would be most unreasonable. The enquiry should be, what was the scale of expenditure on which the child was maintained, and what would be proper to be allowed in respect of it, having regard to the amount of the child's fortune. If the mother has maintained her child on a scale corresponding with his fortune, she will be allowed it; if she has not gone so far, she will be allowed only what she has actually expended. The principle is, that the mother is entitled to a complete indemnity for the money actually expended on her child's maintenance within proper limits, but nothing more.

1845.

 BRUIN
 v.
 KNOTT.

The only other question is, out of what fund the allowance ought to come; and upon that point I am of opinion that, supposing the scale of expenditure not to have exceeded what was warranted by the orphanage share alone, it ought to be defrayed out of that fund. The child had a right to be maintained out of it; and it was clearly for his benefit that he should be maintained out of the income of that fund, in which he had a defeasible interest, rather than out of other property to which he was absolutely entitled. I understand the income of the orphanage share was 800*l.* a year; and from what I have heard in the course of this discussion, I am satisfied that the scale of his maintenance has not been more than was warranted by an income of that amount. I will not, therefore, put the parties to the

Q q 2

expense

1845.

BRUIN
v.
KNOTT.

expense of an enquiry such as Mr. *Tinney* asks, for I am satisfied it would be useless. If I should be mistaken on that point, it will come out by giving the Master liberty to state special circumstances.

The order directed a reference to the Master to inquire and state what sum would be proper to be allowed to *Ann Knott* for the maintenance of the infant *Joseph Aldridge*, deceased, from the death of his father to his own death, regard being had to the manner in which he was maintained from time to time, with liberty to state special circumstances relating thereto at the request of either party.

July 1.

In the Matter of WILLIAM SENHOUSE GAIT-SKELL, a Solicitor of the Court.

Charges in a solicitor's bill for obtaining an order from a judge at chambers for leave to enter satisfaction in the Common Pleas Office upon a bond given by his client

IN the months of *October* and *December* 1844, the petitioner delivered two bills of costs to his client *Edward Burr*, by whom he had been employed in the sale of a brewery. On the 19th of *February* 1844, *Edward Burr* obtained an order *ex parte*, upon a petition to the Master of the Rolls, for the taxation of those bills, the petition representing that they did not contain any

to the Crown for malt duties, held, not to be for "business transacted in a court of law," so as to oust the jurisdiction of the Lord Chancellor or the Master of the Rolls to order taxation of such bill. For that purpose the business must be some proceeding either in a suit or with a view to a suit.

Whether proceedings for the purpose of entering satisfaction on a judgment with a view to the sale of an estate would come within that description, *quære*.

An order referring a solicitor's bill for taxation may be made without notice in either of the two first classes of cases provided for by 6 & 7 *Vict. c. 73. s. 37*.

any business done in any of the courts of law or equity. Mr. *Gaitskell* having been served with that order, immediately presented a petition to the Master of the Rolls, praying that it might be discharged for irregularity; the petition stating that the petitioner had for several years past been the confidential adviser and solicitor of Mr. *Burr* and his family, during which time he had delivered several bills of costs, which had been paid without taxation, and without any objection being made to them: that, in the expectation that the bills in question would be dealt with in the same manner, he had reduced several of the charges in them below the amounts which he would have been strictly entitled to charge; and that in consequence of the urgency of Mr. *Burr* to have the bills, they had been made out in great haste, and contained many errors and omissions which would occasion considerable loss to the petitioner if they should be taxed in their present state. When that petition came on to be heard, it was dismissed with costs, but without prejudice to the petitioner's right to present another petition for leave to amend his bills.

1845.

In re
GAITSKELL.

This was an appeal petition, praying the discharge of that order, and also that the order of the 19th of *February* might be discharged, for irregularity, with costs.

Mr. *Cooper* and Mr. *Miller*, for the petitioner, contended, first, that the order of the 19th of *February*, being for the taxation of a bill which had been delivered more than a month, ought not to have been made *ex parte*, but upon a special application; for that the thirty-seventh section of 6 & 7 *Vict. c. 73.* required that in such cases the order for taxation should be made "with such directions and subject to such conditions as the Court or judge making such reference should think proper;" and that the Court could not determine what

1845.

In re
GAITSKELL.

directions and conditions ought to be inserted in its order without hearing both sides. That the inconvenience of a contrary course of proceeding was exemplified by the present case, in which the petitioner was exposed to the alternative, either of proceeding to the taxation of bills which were never delivered with a view to taxation, and wherein many items were omitted, which would have been inserted if he had known what course was to be pursued; or of incurring the expense of a petition, such as the Master of the Rolls had given him liberty to present, for leave to amend his bills.

Secondly, they contended that some of the items in the bills were for business transacted in the Court of Common Pleas, and consequently that this Court had no jurisdiction to refer them for taxation. The items to which they referred were charges for taking out a summons before a judge at chambers, and obtaining an order thereon for entering satisfaction on a bond given by Mr. *Burr* to the Crown for malt duties. In support of that argument, which they admitted had not been urged at the Rolls, they cited the following authorities: *Hullock on Costs* (a), *Sandom v. Bourne* (b), *Wilson v. Gutteridge* (c), *Weld v. Crawford* (d), *Re Barker* (e), *Ex parte Pritchett* (g), *Winter v. Payne* (h), *Collins v. Nicholson*. (i)

Mr. *Walker* and Mr. *Willcock*, *contra*, contended that the order of the 19th of *February* was properly made *ex parte*, and that it was only in the third class of cases provided for by the thirty-seventh section of the Act,
viz.

(a) Page 504.

(b) 4 *Camp.* 68.(c) 3 *B. & C.* 157.(d) 2 *Stark.* 538.(e) 6 *Sim.* 476.(g) *New Rep.* 266.(h) 6 *T. R.* 645.(i) 2 *Tunst.* 321.

viz. those in which the application for taxation was made after verdict, or after the expiration of twelve months from the delivery of the bill, that a special application was necessary; and that in both the other classes of cases the order of reference had ever since the Act came into operation been made as an order of course.

1845.

In re
 GAITSKELL.

On the second point they contended that the order of a judge for entering satisfaction on a bond of this kind was in fact superfluous, and one which the judges had properly no authority to make; that, at all events, it was a mere formality, in which the judges, supposing them to have a right to interfere at all, only acted ministerially, and not judicially; *Ex parte Fleetwood* (a); and therefore that the order and the proceedings for obtaining it could not be considered as business transacted in a court of law, at least in the sense in which those words had been construed in the act of 2 G. 2. c. 23. *In re Rice* (b), *Ex parte Branson*. (c)

The LORD CHANCELLOR.

I was struck at first with the great generality of the words, "business transacted in any court of law or equity," which seemed to me to embrace the items in question; but it appears, that those words are borrowed from the stat. of G. 2., where they have been repeatedly the subject of judicial decision; and the doctrine of all the cases is, that, to come within the meaning of those words, the business must be some proceeding either in a suit, or with a view to a suit. In *Ex parte Branson*, the items relied on as making the bill taxable under that statute, were charges for obtaining the acknowledgment of a married woman under the Fines and Recoveries

(a) 4 *Man. & Gr.* 640.

(c) 4 *Scott*, 539.

(b) 4 *Scott*, 416.

1845.

In re
GAITSKELL.

Recoveries Act, and enrolling the commissioners' certificate thereof, which last, it was said, was an act done in Court. But the Chief Justice, in giving judgment, said, "Though the deed is required to be enrolled in this Court, it is not a proceeding in a suit; it is nothing more than a mode of conveyance." Every word of that applies *mutatis mutandis* to the present case. The items relied on here are charges for procuring satisfaction to be entered, not on a judgment — that might have been different, for a judgment is a proceeding in a suit either real or supposed — but on a bond to the Crown for malt duties. Before the abolition of the Pipe Office, a *quietus* was obtained out of the Court of Exchequer, and upon the production of an office copy of the *quietus*, a memorandum of it was entered by the Senior Master of the Common Pleas in the book of Crown debtors. After the Pipe Office was abolished, the question arose, in what way these incumbrances were to be discharged. In *Ex parte Fleetwood*, an application was made to the Court of Common Pleas, for an order upon the Senior Master to make the entry without the production of an office copy of the *quietus*; and the Court made the order without determining whether it would be effectual for the purpose or not. Since that time, applications have been made to a judge at chambers, for leave to enter satisfaction upon such bonds. That was the course adopted in the present case: but the proceedings for that purpose were clearly neither proceedings in a suit, nor with a view to a suit, and, therefore, do not come within the description of "business transacted in a court of law or equity."

The other point relied upon by the appellant was, that the order of reference ought not to have been made *ex parte* but upon a special application. The petition
upon

upon which that order was made, was presented after the expiration of one month, but within twelve months, from the time of the delivery of the bills. Now, it is true, that in the case of bills so circumstanced, the act provides that the order of reference shall be made with such directions, and subject to such conditions, as the Court or Judge shall think proper; but then there immediately follows a proviso, that after twelve months have elapsed from the delivery of the bill, or a verdict has been obtained for the amount, no such reference shall be directed except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application shall be made. In these last cases, therefore, there is to be examination, and enquiry, and evidence of witnesses, for the purpose of guiding the discretion of the Court; and when I find that the legislature has distinctly provided for that course in this class of cases and not in the other, I think I am justified in coming to the conclusion, that in the latter class of cases, it is not necessary to institute any enquiry or examination before the order is made, but that the legislature intended that directions should be given in the order with reference to the state of the proceedings as contained in the petition; subject, of course, to this, that if the party applying misrepresents the circumstances, the order will be discharged, on the ground that the Court, in making it, has been misled. With that qualification, I think there is no danger in making orders of course in different forms, applicable to different states of circumstances.

I am of opinion, therefore, on both points, that the order of the Master of the Rolls was right, and that this petition must be

Dismissed with costs.

1845.

In re
 GAITSKELL.

1845.



1843.

Dec. 15.

1845.

July 10.

If the sentence of an Ecclesiastical Court in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in this Court between the same parties for distribution.

July 10.

BARRS v. JACKSON.

THIS was an appeal from a decree of Vice-Chancellor *Knight Bruce*.

The material facts of the case are shortly stated in the Lord Chancellor's judgment. The only authorities cited in the argument will be found referred to in the report of the hearing below. (*a*)

Mr. *Simpkinson* and Mr. *Heathfield* for the Plaintiffs (the Respondents).

Mr. *Purvis* and Mr. *Hubback* for the Defendants (the Appellants).


The LORD CHANCELLOR.

In this case *Harriet Martindale Smith* died unmarried and intestate, and a suit was instituted in the Prerogative Court for administration to her estate. *Jackson*, the Defendant in this suit, claiming as second cousin to *Harriet Martindale Smith*, and as her next of kin: Mrs. *Barrs* claiming as her niece, and next of kin. The Court decided in favour of the claim of *Jackson*, and the sentence was, that administration should be granted to him as next of kin. A suit was afterwards instituted in this Court — the suit now before me — by Mrs. *Barrs*, claiming, as niece and next of kin, the residuary estate of the intestate.

The Defendant, in his answer, insisted on the sentence of the Ecclesiastical Court, by which administration was
awarded

(*a*) 2 Y. & C. C. C. 585.

1845.


BARRS
v.
JACKSON.

awarded to him. He stated that the question now in issue was the sole question in the Ecclesiastical Court, and that it was there decided in his favour. The question is whether, this point having been decided between the same parties, that decision is conclusive. The Vice Chancellor did not consider it conclusive, but directed an issue; and from that order this appeal is brought.

It was stated at the bar and before the Vice Chancellor, that this point had been decided by the House of Lords in 1776, in the case of *Bouchier v. Taylor*. (a) If that be so, if the point was raised in that case, and was actually decided, I cannot enter into any general reasoning upon it, but I am bound by that decision. Therefore it is necessary to consider the case of *Bouchier v. Taylor*. Dr. *Bouchier* claimed to be next of kin to *Anne Millington*. He claimed as her first cousin once removed. *Alice Merchant* claimed as her first cousin. A suit was instituted for administration in the Prerogative Court, and the decision was in favour of Dr. *Bouchier*. That decision turned solely on the question, which of the two claimants was next of kin. Afterwards a suit was instituted in this Court by a person claiming under the will of *Alice*, as her residuary legatee; the Defendant insisted on his title as next of kin, and the question was, whether the decision of the Ecclesiastical Court was conclusive and binding on the parties. The suit, there, was not actually between the same parties, but between one of the same parties and a person claiming under the other, so that in effect it was between the same parties. It came on before the Lord Keeper *Henley*, and the sentence being insisted on as a plea in bar to the suit, it was ordered that the plea should stand for an answer, with liberty to except. Exceptions were

(a) 4 B. P. C. 708.

1845.

—
BARRS
v.
JACKSON.

were accordingly taken. On the argument of those exceptions there were two points in controversy ; first, whether the sentence was conclusive ; and, secondly, if it was not, what was the effect of certain special circumstances, which were also insisted on. The Lord Keeper directed an issue, and Lord Chancellor *Bathurst* on appeal affirmed that decision, only varying the form of the issue. An appeal was then carried to the House of Lords, while Lord *Bathurst* himself sat there as Chancellor. Lord *Mansfield* was present ; the case was elaborately argued, and the result was, that the House of Lords reversed the decision of the Lord Chancellor, in his presence. If, therefore, in that case this point was raised and decided, that decision concludes the question as far as this Court is concerned. It was said, however, that nothing appeared in the order of the House of Lords to shew on what ground it proceeded : it was a mere judgment of reversal. It is only by looking at what falls from the Lords in moving the judgment, that you collect what are the precise grounds of the decision. Now at that time there were no reports of proceedings in the House of Lords. Mr. *Brown* collected and abstracted the appeal cases decided there, and his report is nothing more than an abstract. Therefore, if it rested on Mr. *Brown*'s report, it would be difficult to say on what ground the judgment in question proceeded ; but we happen, from another source, to have a very distinct account of what passed, from which it appears that the House of Lords decided the case on both grounds. For that we need no better authority than the evidence of Mr. *Hargrave*. He was counsel in the cause : he drew the case for the Appellant, and he was present at the argument and judgment. In his *Law Tracts* (p. 473.), after stating that two points were made, — one being, whether the sentence of the Ecclesiastical Court was not conclusive ; the other, whether the

the

the special circumstances of the case did not make an issue improper — he goes on to say, that, “on the hearing the decree was reversed on both grounds, without the least opposition by the Lord Chancellor, or any other Lord: and Lord *Mansfield*, who was the only speaker on the subject, in his reasons against the decree, was clear that the sentence was conclusive, notwithstanding the difference in point of objects between the two suits; and that the Court of Chancery, in exercising its concurrent jurisdiction as to distribution, was concluded by sentences of the Spiritual Court in granting administration, and not at liberty to re-examine the points decided in the exercise of that peculiar jurisdiction.” In that case, as in this, the suits were for different objects; one was for administration, the other for distribution; but the fact had been in issue between the same parties, and had been decided between the same parties. It appears, therefore, from Mr. *Hargrave*’s account, that in the House of Lords the case of *Bouchier v. Taylor*, which was exactly similar to the present, was decided on that as one of the two grounds taken by the Appellant; and if I am satisfied that Mr. *Hargrave*’s representation of what passed is correct, and I have no reason whatever to doubt it, I am bound by that decision.

1845.
BARRS
v.
JACKSON.

It was, however, said in argument that that decision was previous to the opinion of the Judges in the *Duchess of Kingston’s Case* (a), the former being pronounced in *March* 1776, the latter in *April*, of the same year. But no opinion expressed by the Judges in the House of Lords can be put in competition with a decision of that House, except so far as it is adopted by them. And, therefore, no opinion expressed by the Judges ought to weigh with me against the decision to which I have referred. The only

(a) 20 *How. St. Tr.* 355.

1845.

BARRS

v.

JACKSON.

only point, however, decided in the *Duchess of Kingston's Case*, and which had no relation to this question, was this, —that the sentence of an Ecclesiastical Court in a suit of jactitation of marriage was not conclusive, as to the validity of the marriage, in a prosecution subsequently preferred against one of the parties for bigamy. The Judges further gave their opinion that even if it had been conclusive, still evidence was admissible to shew that it was obtained by fraud. I have carefully read through the opinion of the judges as delivered by Chief Justice *De Grey*, and I have found nothing in it at variance with the decision in *Bouchier v. Taylor*; for the ground of their opinion was, that the two proceedings were between different parties, and that the decision of a question raised between Mr. *Harvey* and the Duchess of *Kingston* could not be conclusive in another proceeding between the Duchess of *Kingston* and the Crown.

Some observations were made upon the form of the sentence of the Ecclesiastical Court, as if in consequence of the form it ought not to be considered conclusive. The terms of the sentence were, that, as far as appeared by the evidence, *Jackson* had proved himself next of kin. That is the usual form of the sentence in such cases, and it is the form in *Bouchier v. Taylor*, “that, as far as appeared by the evidence, Dr. *Bouchier* had proved himself next of kin.” Therefore if any argument could be built upon the form of the sentence, it would have applied equally to that case as to the present: but it appears to me that nothing, in fact, turns upon the form of the sentence: for where the Court decides upon an issue of fact, it must be presumed to decide upon the evidence actually adduced before it, and therefore the sentences in these two cases express nothing more than
what

what is necessarily involved in every decision upon an issue of fact.

1845.

BARRS
v.
JACKSON.

But before the case of *Bouchier v. Taylor*, the same principle was laid down by Lord *Hardwicke* in *Thomas v. Ketteriche*. (a) In that case the question was litigated in the first instance in the Ecclesiastical Court, where both the parties were decided to be next of kin in equal degree, and administration was granted to *Ketteriche*, because *Thomas* was a minor. Afterwards a suit was instituted in this Court for distribution; *Thomas* the Plaintiff claiming the entire residue, as sole next of kin, notwithstanding the decision in the Ecclesiastical Court; but Lord *Hardwicke* held, that that decision could not be controverted. It was observed that that was a question of law, but that seems to me to strengthen the authority of the case. It is true, that Lord *Hardwicke* agreed with the Ecclesiastical Court in their conclusion, but he stated distinctly, that, at all events, he should have been bound by their decision. He says, "What would be the consequence if I were to decide contrary to the sentence of the Ecclesiastical Court, that the Plaintiff was the sole next of kin? A suit for distribution might have been instituted in the Ecclesiastical Court, the two courts having concurrent jurisdiction with respect to distribution. The Ecclesiastical Court would have been bound by the decision in the suit for administration; and it follows as a matter of course, that this Court must also be bound, otherwise the two Courts would come upon the same facts and circumstances to contradictory conclusions." That is the case also here. I have informed myself by communication with one of the highest authorities on this subject, that that decision as to the fact in the Prerogative Court, in

(a) 1 *Vez. sen.* 533.

1845.

BARRS

v.

JACKSON.


in a suit for administration, being unappealed from, would, if the suit for distribution had been instituted in the Ecclesiastical Court, have been conclusive: and if it is conclusive there, it ought to be conclusive here.

A case before Lord *Holt*, *Blackam's Case*, was also referred to (a), as leading to a contrary conclusion; but it appears to me to run in the same direction. *Jane Blackam* was the intestate; the plaintiff in the action stated that he had married her a short time before her death, and he claimed her goods as her husband; the defendant set up the administration granted to him, insisting that it never could have been granted to him but upon the supposition that there was no such marriage. The answer was, that that question had never been put in issue in the Ecclesiastical Court in granting administration, and that the judgment of that Court was only conclusive as to circumstances put in issue, not as to matters to be inferred from the judgment; and that corresponds exactly with what was stated by Lord Chief Justice *De Grey* in the House of Lords, — matters directly put in issue and decided between the same parties are conclusive; but not matters that are only to be inferred from the judgment. That is the principle of the decision in *Blackam's Case*. Lord *Holt's* language is this: — “A matter which has been directly determined by the sentence of the Ecclesiastical Court cannot be gainsaid: their sentence is conclusive in such cases, and no evidence shall be admitted to prove the contrary: but that is to be intended only in the point directly tried; otherwise it is, if a collateral matter be collected or inferred from their sentence, as in this case. Because the administration was granted to the Defendant, therefore they infer that the Plaintiff was not

(a) 1 *Salk.* 291.

not the intestate's husband, as he could not have been taken to be if the point there had been, married or unmarried, and their sentence had been not married." That decision, therefore, amounts to nothing more than this, — that if the question had been put in issue and decided, the sentence would have been conclusive; but that, not having been put in issue, you are not to infer that fact from the sentence. And it is remarkable, that Lord *Mansfield* appears to have relied on that very case in moving the judgment of the House of Lords in *Bouchier v. Taylor*. "The doctrine of Lord *Holt*," Mr. *Hargrave* says, "in *Blackam's Case*, was cited, and Lord *Mansfield* read Lord *Holt's* words out of *Salkeld* as the ground of his own opinion." It appears to me, therefore, that the authority of that case, so far from operating against the decision in *Bouchier v. Taylor*, tends most strongly to confirm it.

I do not enter into any of the general arguments in this case, or into the other authorities that were cited, none of which have so close a bearing upon it as those to which I have referred: nor is it necessary to do so; for if the point was decided by the House of Lords in *Bouchier v. Taylor*, as I think it was, I am bound by that decision, whatever opinion I might entertain adverse to it. The appeal, therefore, must be allowed.

1845.

 BARRS
 v.
 JACKSON.

REPORTS

OF

CASES

1845.

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

1845.

July 25. 31.

MALINS v. PRICE.

In taxing the costs of a motion for a new trial of an issue, the costs of copies of the short-hand writer's notes of the evidence taken on the former trial are in the discretion of the taxing master, regard being had to the nature of the issue and the extent to which such copies, if at all, were necessary, but in no case will more than two copies be allowed.

IN taxing the costs of an unsuccessful motion for a new trial of an issue, the Taxing Master had allowed 90*l.* for the expense of copies, furnished to counsel, of the short-hand writer's notes of the evidence given on the former trial, which had lasted seven days.

Vice-Chancellor *Knight Bruce* having on petition disallowed that charge, the question was now brought by appeal before the Lord Chancellor.

Mr. *K. Parker* and Mr. *J. H. Palmer*, for the Appellant, cited *Stewart v. Steele* (a), *May v. Tarn* (b), *Alsop v. Lord Oxford*. (c)

Mr.

(a) 4 *Mann. & Gr.* 669.

(c) 1 *M. & K.* 564.

(b) 12 *Mec & W.* 750.

Mr. Russell, Mr. Temple, and Mr. Malins, contra.

1845.

MALINS

v.

PRICE.

The LORD CHANCELLOR.

July 28.

I have made enquiries as to the practice of the Courts of Common law, and I am informed that in those Courts the general rule is, not to allow the costs of the short-hand writer's notes of the evidence; subject, however, to a discretion in the Taxing Officers to allow them in particular cases, and as to particular portions of the evidence.

The practice of those Courts, however, is open to the observation, that the counsel moving for new trials there are generally the counsel who were present at the trial, and whose duty it is to take such notes of the evidence as will serve them for the purpose of the motion; whereas on similar applications in this Court the counsel are generally strangers to what has passed at the trial. I have therefore enquired of the Taxing Officers of this Court as to what the practice has been within their experience; and the answer I have received from Mr. *Follett*, who is one of the most able and experienced of these Officers, is in these words: —

“ I consider it to be the practice, on application for a new trial of an issue at law, to allow as between party and party the costs of employing three counsel; that is to say, the two counsel in the cause in equity, and one of the counsel engaged on the trial at law; and to allow for the counsel in equity copies of any notes which may have been made, whether by counsel, or by the attorney, or by a short-hand writer, of the evidence, &c. at the trial.

R r 2

“ I understand

1845.

MALINS
v.
PRICE.

“ I understand that there was formerly a good deal of difference of opinion as to what were the proper costs on such occasions, but that about twelve or fourteen years ago a case arose in which Mr. *Wainwright* was clerk in court on the one side, and Mr. *Sidney Smith* on the other; that they referred the case to Mr. *Mills*, who, after communicating with the solicitors, and consulting with Mr. *Jackson* and others, decided the practice to be as above stated, and the costs were settled accordingly. .

“ These cases are not of frequent occurrence, and I do not myself recollect any instance of such a taxation occurring to me, either while I was in practice or since; but I understand from several of my colleagues to whom such cases have occurred, that the practice since the period above mentioned has been considered settled, and has been uniformly acted on. And I find by reference to the bill of costs in *Ansdell v. Gompertz*, taxed in 1837, which I have procured from Sir *Giffin Wilson's* office, that the copies of the short-hand writer's notes were there allowed on the taxation between party and party.

“ The reason of the rule of allowance in question I take to be this. The common law counsel engaged on the trial would have his own brief, on which he must be presumed to have made sufficient notes for his own use. But the counsel who were not on the trial would have no brief, nor any knowledge whatever of the case they were to argue, except the brief delivered to them for the motion. This brief must necessarily contain either a *statement* prepared for the purpose, of what took place on the trial, or a copy of some document already existing containing that information. The practice is, therefore, to deliver to the equity counsel copies of

of any notes which may be in existence of the proceedings on the trial; such notes, as the case may be, being taken by the counsel, or by the attorney, or, as more frequently happens, being of course the more accurate, by a short-hand writer.

1845.
MALINS
v.
PRICE.

“Of course the costs of employing the short-hand writer are not allowed, but only the same charge of 3s. 4*d.* a sheet for copying his notes, as would be charged for copying the notes of the counsel, or any other document. And it should be borne in mind that, if instead of copies of notes of evidence, the solicitor had to prepare a statement by way of brief for his counsel, the charge would be 6s. 8*d.* a sheet for drawing such statement, over and above the charge of 3s. 4*d.* for copying it.

“I have spoken to all the other Taxing Masters on the subject, and I may add that we are unanimous in opinion that, assuming the case to be one properly requiring that the counsel should be instructed as to the proceedings on the trial, the costs of the copies of the short-hand writer’s notes for the counsel *not* engaged on the trial, ought, according to the practice of this Court, to be allowed.”

[After reading this certificate, his Lordship proceeded: —]

I cannot help thinking that there is a great deal of good sense in the reason here given for the allowance of such copies in a Court of Equity. It is the duty of the solicitor to lay before counsel the most perfect statement he can of what took place on the trial, and he will naturally resort to the short-hand writer’s notes, exercising,

1845.

MALINS

v.

PRICE.

ing, of course, a discretion as to the parts which he inserts being essential to the support of the case. In this case, the question at issue on the trial was a very complicated one; and after this certificate of the practice, my order must be, that there be a reference back to the Taxing Master to review his report, and to exercise his discretion as to whether the short-hand writer's notes ought to have been furnished to the counsel, and if so, to what extent; and to tax the costs accordingly; but to allow more than two copies.

1844.

March 22.

1845.

Dec. 20.

HILLS v. NASH.

A Defendant to a suit for winding up a partnership has a right to insist that the suit shall be so constituted as that the decree may be binding on all the parties to the partnership contract: and, therefore, a bill by one against another of five partners in a joint speculation, for an

account and payment of the Defendant's contributory share of an alleged loss on the winding up of the concern, was held to be defective as to parties, although it was alleged and proved that the Plaintiff had, as managing partner, made all the advances himself, and that he had settled with and released the other copartners; and it was held that an undertaking by the Plaintiff, to bear any liability which, on taking the accounts, might appear to subsist against the absent partners in favour of the Defendant, would not cure the defect.

THE bill stated that in the month of *April* 1840 the Plaintiff, who was a corn merchant, entered into a joint speculation with one *Nash*, deceased, (the father of the Defendants of that name, who were his executors,) and with the Defendant *Carpenter*, and two other persons named *Sheppard* and *Webb*, for the purchase and sale of *English* wheat; the terms of the agreement between them, which was a verbal one, being, that they should be interested in the profits and losses of the adventure in the proportions of the quantities of foreign wheat which they then respectively held in bond. That these proportions were afterwards ascertained to be, and were, in fact, as follows: The Plaintiff, 9-9ths, *Carpenter*,

Carpenter, 4-9ths, *Webb*, 1-9th, and *Sheppard* and *Nash*, 1-18th each. That the purchases and sales under the agreement were made partly by the Plaintiff and partly by *Carpenter*, but principally by the Plaintiff; that the speculation, after having gone on for three months, had resulted in a loss of 18,180*l.*; that it had since been wound up, and all liabilities in respect thereof fully discharged by the Plaintiff; that *Nash's* share of the loss was 1010*l.*; that *Carpenter's*, having been ascertained by arbitration, had been settled between him and the Plaintiff; that *Sheppard* had paid his share, and that *Webb* (who was insolvent) had been released by the Plaintiff from his share without any payment; and that none of those parties had any claim upon or liability to the estate of *Nash* in respect of the speculation. The bill prayed an account of all sums received and paid by the Plaintiff under the agreement on the joint account of himself and the other parties to the adventure, and payment out of *Nash's* estate of his proportion of the loss.

1844.
HILLS
v.
NASH.

Webb and *Sheppard* were not made parties; but they were examined as witnesses on the part of the Plaintiff, and they confirmed by their evidence the case made by the bill.

The Defendants, the *Nash's*, by their answer, stated, that they knew nothing of the alleged agreement or speculation, and that they did not believe that their father had had any share in it; but submitted, that if it should appear that he had, *Webb* and *Sheppard*, as well as *Carpenter*, were necessary parties to the suit.

On the hearing of the cause before the Master of the Rolls, his Lordship overruled the objection for want of parties, and made a decree declaring that the estate of
Nash

1844.

HILLS

v.

NASH.

Nash was liable to the 1-18th share of the loss incurred in the speculation; and an account was directed of the dealings and transactions between the Plaintiff and the several other parties to the speculation in respect thereof; and the Master was to ascertain what loss was incurred in it, with liberty to state any circumstances specially: and the Plaintiff undertaking to bear all liabilities (if any) which, in the enquiry so directed, might appear to subsist against *Webb* and *Sheppard*, in favour of the estate of *Nash*, it was ordered that the Master should enquire whether there were any and, if any, what claims outstanding in respect of the said speculation; and further directions and costs were reserved.

The Defendants, the *Nash's*, appealed from the decree; and the appeal now coming on to be heard,

Mr. *Wakefield* and Mr. *J. Parker* for the appellants, renewed the objection for want of parties, insisting that it was of the essence of a suit of this nature that all the parties to the contract should be concluded by the Master's Report, and the decree to be founded thereon. That it was not to be assumed at this stage of the cause that the speculation had resulted in a loss, or that the advances had been made by the Plaintiff and *Carpenter* only, or that all the debts and liabilities of the concern had been discharged. If any one of those allegations should turn out to be untrue, the Appellants might have claims for contribution against *Webb* and *Sheppard*, for which they were not bound to accept the undertaking given them by the decree. The course adopted by the Plaintiff was a singular one; for it was only upon the evidence of these parties that he was entitled to any decree at all; and yet it was only on the supposition that the facts deposed to by them were true, that they could

could be competent witnesses; for, as parties themselves to the speculation, they were obviously interested in multiplying the number of the other parties to it, in order to diminish their own share of liability. The *Bank Case* (a) might be cited on the other side; but the doctrine of that case was not now the law of the Court. *Long v. Younge* (b).

1844.

HILLS

v.

NASH.

Mr. Romilly and Mr. Piggott for the Respondent, contended that, according to the case alleged and proved by the Plaintiff, *Webb* and *Sheppard* were not necessary parties. That if the Appellants had any confidence in the truth of the hypothetical case set up by them at the bar, they were not without their remedy, as they might themselves file a bill against all the parties; but that it was not reasonable that the Plaintiff should be embarrassed in his remedy by a mere suggestion that the case was not such as his witnesses had deposed to.

Mr. Wakefield in reply.

The LORD CHANCELLOR.

1845.

Dec. 20.

The Plaintiff is a corn-factor. In the year 1840, he engaged in a speculation with the testator *Nash*, *Carpenter*, *Sheppard*, and *Webb*, for the purchase and sale of *English* wheat. The purchases and sales were to be made by the Plaintiff and *Carpenter* — but principally by the former — on the joint account, and at the joint risk. The respective parties were to be interested in the adventure, according to the proportions in which they held foreign wheat at the time of the agreement. The dealing continued for about three months; at the expiration of which time a heavy loss had been sustained,

(a) 2 *Eq. Cas. Abr.* 166. pl. 7.

(b) 2 *Sim.* 369.

1844.


HILLS
v.
NASH.

tained, amounting to upwards of 18,000*l*. This suit was instituted to recover from the personal representatives of *Nash* his proportion of this loss.

The Defendants, the executors, by their answer insisted that *Sheppard* and *Webb* were necessary parties to the suit. The Master of the Rolls overruled the objection, and the Defendants, the executors, have appealed from that decision.

If the Plaintiff had agreed separately with each of several individuals to engage with him in a speculation of this sort, and that each should be interested in the profit and loss in a certain proportion, a bill might have been filed against any one of them to obtain payment of his proportion of the loss, without making any of the other contractors parties; for this would have constituted so many separate contracts. But in the present case all the parties mutually contracted with each other to engage in this speculation, and to share the profit or loss. It was a mere case of partnership in a particular transaction or series of transactions, in which the business was to be transacted, and the capital advanced, by two of the partners. According to the general rule, therefore, the bill being filed for an account of the partnership transactions by one of the partners against some of the other partners, all the rest ought to have been joined as parties to the suit. Is there any thing then in this case to take it out of the general rule?

The circumstances insisted upon are these: That *Sheppard* has paid what is stated to be his share of the loss, and has obtained a release from the Plaintiff; that *Webb* is wholly unable to pay, and has been excused by the Plaintiff; that the case between *Carpenter* and the Plaintiff was referred to arbitration,
and

and the sum awarded has been paid to the Plaintiff. But none of these transactions are binding upon *Nash* or his representatives, or can in any way affect their rights. It does not appear to me that they take the case out of the ordinary rule. If a decree should be obtained upon this record, it will not have any force against those who are not parties to the record. It would not be binding upon them, if any dispute should arise between these parties or any of them and *Nash's* executors as to the proportion of their contributions, or of their obligation to contribute to the loss, or respecting any other matter arising out of this transaction.

I think, therefore, the objection for want of parties ought in this case to have been allowed. This is the conclusion to which I have come, though it is not without doubt and hesitation that I have differed from the Master of the Rolls upon a point of this nature.

1844.

HILLS

v.

NASH.

1844.

1844.

Feb. 5.

1845.

Dec. 20.

Mere neglect of duty in an executor, as, for instance, the omission to invest balances pursuant to a direction in the will, if unaccompanied by fraud, is not such misconduct as to disentitle him to the general costs of a suit for the administration of the estate, although it may subject him to the costs of so much of the suit as was occasioned by such neglect.

HEIGHINGTON v. GRANT.

THIS was an appeal from a decretal order of the Master of the Rolls, by which an executor and trustee, who had been charged by the decree with compound interest at 5 per cent. (a), on balances which he had retained in his hands, and with the costs of so much of the suit as sought to charge him with such interest (the costs of the rest of the suit being reserved) was, on further directions, allowed his costs of the rest of the suit, as between solicitor and client, out of the estate.

Mr. *Wakefield* and Mr. *Shebbeare*, for the appeal, contended that the order on further directions was inconsistent with the decree; for that an executor was never charged with compound interest at 5 per cent., unless for misconduct so gross as, if not to make him liable for the costs of the whole suit, at all events to disentitle him to receive his costs of any part of it. *Raphael v. Boehm* (b), *Tebbs v. Carpenter* (c), *Crickelt v. Bethune* (d); and that in this case, if the Defendant had not disputed his

(a) By the terms of the decree the Master was directed to take an account of the balances which had remained in the hands of the Defendant at the end of each year since the testator's death, and to compute interest at 5 per cent. on such balances; and in taking that account he was to make annual rests.

The Master in proceeding upon this decree computed interest on the balances from the times when they were respectively found to have been in the

Defendant's hands, without adding such interest to the principal at the end of each year; and the Master of the Rolls overruled exceptions taken by the Plaintiff to that report; but on appeal to the Lord Chancellor (*Cottenham*), his Lordship reversed that decision, and held that the effect of that form of decree was as stated in the text.

(b) 11 *Ves.* 92., 13 *Ves.* 590.

(c) 1 *Madd.* 290.

(d) 1 *J. & W.* 586.

his liability for such interest, the suit would never have been instituted.

Mr. *Russell* and Mr. *T. Parker*, for the Respondent, shewed from the record that the dispute about interest had not been the only occasion of the suit, inasmuch as the bill not only prayed the general execution of the trusts of the will, but contained other charges of misconduct against the Defendant which had not been substantiated; and they relied upon *Flanagan v. Nolan* (a), and *Travers v. Townsend* (b), as shewing that executors were not disallowed their costs, unless their accounts were falsified, or their misconduct were such as to amount to fraud; and that the mere omission to invest balances was not considered to be misconduct of that nature.

1844.

 HRIGHTINGTON
 v.
 GRANT.

Mr. *Wakefield*, in reply, insisted that the accounts of the executors had in this case been falsified; but the only instances he referred to in support of that assertion were a few items, claimed by the executors in their discharge, as expenses incurred in the execution of the trust, and which had been partially disallowed by the Master.

The LORD CHANCELLOR.

1845.
 Dec. 20.

Where accounts are said to be falsified, it means that they contain charges in the nature of fraud. It does not follow, because charges are fixed by the party at a certain sum, and the Master thinks them too large, that therefore the accounts are falsified.

The LORD CHANCELLOR.

This was an appeal from a decree on further directions

(a) 1 *Molloy*, 84.

(b) *Ibid.* 495.

1845.

 HEIGHINGTON
 v.
 GRANT.

rections by the Master of the Rolls as to the question of costs. The suit was against the Defendant as executor of the will of *Robert Heighington* for the administration of the testator's estate. The bill prays that the rights of the Plaintiffs under the will may be declared and ascertained; that an account may be taken of the personal estate, not specifically bequeathed, and of such part as had been received by the Defendant or might have been received, but for his wilful default; that an account may also be taken of the testator's debts, funeral expenses, &c.; and that the balance may be ascertained; and that the Defendant may be charged with interest on the balances in his hands with proper rests, &c.

The bill charged that the Defendant had not invested the residue as directed by the will, and had employed the money in his business as a banker and shopkeeper. The Defendant admitted that he had not invested the money, but denied that he had employed it in his business; and he gave, among other things, as an explanation of the reason for not having invested it, that he had to pay money from time to time in and about the maintenance and support of the testator's family, agreeably to the directions of the will. He admitted that he had made interest of the money.

The Plaintiffs failed in that part of their case by which they sought to charge him for, what, but for his wilful default, he might have received. The Master of the Rolls, under these circumstances, directed that the Defendant should have the costs of the suit, with the exception of the costs of that portion of it which the Defendant had been ordered to pay to the Plaintiffs. The Plaintiffs object to this part of the decree. The cause had been several times, and in its different stages, before

before the Master of the Rolls, and he states, that this second charge in the bill had led in the progress of the cause to much discussion.

1845.
HEIGHINGTON
P.
GRANT.

No case of fraud was established against the Defendant; neither were his accounts falsified in any material particular. But, undoubtedly, he ought to have invested the property agreeably to the directions of the will. In omitting to do this, he was guilty of negligence, and was properly charged with the costs arising out of that part of the case. With respect to the other part of the charge, the decision was in his favour, and he must, therefore, in all matters, except as to that for which he has paid the penalty, be taken to have acted correctly. I am of opinion, therefore, that he is entitled to costs as to the rest of the suit, and more especially as those costs have been occasioned, in fact, by the unfounded charge made against him. In the case of *Flanagan v. Nolan*, the Lord Chancellor *Hart* observed: "The Court does not visit the improper holding of money, if there is nothing more, farther than by charging the executor with interest; but if his account is falsified, if anything like fraud appears, then the Court gives costs against him." And again, "he may have had a balance in his hands, and may be charged with interest on it; and he may, nevertheless, be entitled to have his costs against the fund, if he has kept a regular account, and furnished it correctly."

In the case of *Travers v. Townsend* the same learned judge observes: "If the evidence had gone to the extent that the executor should be charged with a sum of money lost by his default, yet if he had come in with a just account which was not surcharged or falsified, although the executor must pay in that case the particular costs incurred in establishing the matter of charge against

1845.

 HEIGHINGTON
 v.
 GRANT.

against himself, he should, notwithstanding, have had allowed to him reasonable costs of suit, and passing his account. Nor is there anything more reasonable than that an executor answering his duty of accounting fairly should have his costs. I have often heard it laid down as a principle, by some of the greatest judges, that an executor, though, in the result, made answerable for default by reason of loss incurred through neglect, or chargeable with interest for retaining money in his hands, yet, if there was nothing beyond such negligence or detention of money against him, is still entitled to the costs of the suit. So in *Raphael v. Boehm* before Lord Eldon, though the executor was charged with compound interest, he got his costs. Sir *Anthony Hart* makes this observation in speaking of that case: — “I was counsel in *Raphael v. Boehm*. Costs were not given against the executor in that case, and either the Vice Chancellor or the Reporter mistook, if it is said in *Tebbs v. Carpenter* that costs were given against the executor in *Raphael v. Boehm*. He was charged with compound interest, but he got his costs.”

The Court does not visit the improper holding of money, if there is nothing more, further than by charging the executor with interest; but if his account is falsified, if any thing like fraud appears, then the Court gives costs against him. I am of opinion, therefore, with the Master of the Rolls, that the Plaintiff is entitled to the costs which have been awarded to him by the decree.

1845.

Ex parte VAN SANDAU.

THE order of the Court of Review restraining Mr. *Van Sandau* from prosecuting his action for false imprisonment against Messrs. *Turner* and *Hensman* having been discharged by the Lord Chancellor, as above reported (a), the demurrer put in by him to the Defendant's plea came on for argument before the Court of Queen's Bench, and was allowed, on the ground of a defect of averment in the plea, relative to the warrant of commitment, thereby leaving all the questions, which had been raised in this Court on the validity of the order of commitment, undecided.

In that state of things the appeal petition of Mr. *Van Sandau* now came on again, and the several points raised on the former occasion were again discussed by

Mr. *Bagshawe* and Mr. *Rolt* for the petitioner.

Mr. *Swanston*, Mr. *K. Parker*, and Mr. *Simon* *contra*.

As to the regularity of the order in directing payment of costs, charges, and expenses, the following additional cases were cited on the part of the respondents. *Bullen v. Ovey* (b), *Lennard v. Attwell* (c), *Bishop v. Willis* (d).

On a subsequent day

The LORD CHANCELLOR said : — I have considered this case with great anxiety at different times ; but I think

April 30.

May 6.

July 3.

1846.

April 23.

An order of commitment ought, in strictness, to be prefaced by an express adjudication that the act complained of is a contempt ; but the absence of such adjudication is not a ground for discharging such an order for irregularity.

It is not irregular to engraft upon an order of commitment an order that the party committed shall pay the costs of his contempt ; but if the order extend to charges and expenses as well as costs, it is to that extent irregular.

July 3.

(a) *Suprà*, p. 445.

(b) 16 *Ves.* 141.

(c) 17 *Ves.* 385.

(d) 5 *Beav.* 83. n.

1845.

Ex parte
 VAN SANDAU.

think I ought not to interfere at this stage of the proceedings, unless Mr. *Van Sandau* will consent not to proceed further with the actions; for I cannot tell at present, in what way or on what scale the jury will award damages. If Mr. *Van Sandau* will consent to go before the Master, I will dispose of all the questions as to costs; but if he is determined to go on with the action, I will see first what the jury do, for if I disposed of the costs now, I might be giving him costs which the jury would afterwards include in the amount of damages which they award him.

Mr. *Van Sandau* having consented to these terms, the case stood over for the Lord Chancellor's final judgment.

1846.
 April 23.

The LORD CHANCELLOR.

It has been agreed between the parties in this case that all the matters in controversy between them, including the action in the Court of Queen's Bench, should be left to my decision, and I have, in order to prevent further litigation, undertaken the task of finally settling these disputes.

The first question to be considered is the validity of the order of commitment of the 4th of *February* 1844. The order recites a petition charging Mr. *Van Sandau* with having written and published a libel reflecting on the conduct of the petitioners as solicitors, in a matter depending in the Court of Bankruptcy, and upon the learned Chief Judge of the Court of Review.

The libel is set out in a schedule to the petition and in the order, and the petitioners pray that Mr. *Van Sandau* may be committed to the Queen's Prison for his contempt of the Court, and that a warrant may issue for
 that

that purpose, and that Mr. *Van Sandau* may be ordered to pay to the petitioners the costs, charges, and expences of that application, and incident thereto.

1845.

Ex parte
 VAN SANDAU.

When this case was before me on a former occasion, I observed that the main question as to the validity of the order would depend upon the consideration as to whether there was in this case a sufficient adjudication of a contempt having been committed.

The order is in these terms, “that the said *Andrew Van Sandau* do stand committed to the custody of the keeper of the Queen’s Prison for his contempt of this Court in writing, printing, and publishing the aforesaid printed paper, so set out as aforesaid in the schedule to the said petition.”

The sufficiency of the order was questioned in the action which was then depending in the Court of Queen’s Bench. The learned judge of that Court did not, however, decide the point; the defects in the warrant of commitment rendering it unnecessary. The question, therefore, still remains to be determined.

It was said on the part of the respondents, that when the Court orders a party to be committed for his contempt in writing and publishing a paper which is set out in the order, this amounts to an adjudication. It was contended, that it was a sufficient averment that he had written and published the paper so set out, and that in so doing, he had been guilty of a contempt. If this form of order had been used for the first time upon the present occasion, and there were no precedents to appeal to on the subject, I should have come to the conclusion that the order was insufficient. I should have considered it necessary that there should have been a direct and distinct adjudication, and not by way of inference

1845.

Ex parte
 VAN SANDAU.

and argument merely, that the party accused had committed the act complained of, and that such act was a contempt of the Court; that the order ought, in these respects, to have contained precise statements corresponding, in substance, with the order of Lord *Cottenham*, in the case of Mr. *Lechmere Charlton* (a), of Lord *Brougham* in *Wellesley v. The Duke of Beaufort* (b), of Lord *Hardwicke* in the case of *Martin* in 1747 (c), and of the same learned Judge in some other cases. But I find, upon enquiry and upon examination of the precedents in cases of commitment for contempt, that there are so many instances, at different periods, upon the records of the Court, in which the form used in the present case has been adopted, and without question, that I think I should not be justified in discharging the order upon this objection.

In the case of the printer of the *St. James's Evening Post* (d), it appears that certain libellous observations had been published relative to the proceedings and parties in a cause, depending in the Court of Chancery. Complaint was made to the Court, and it was prayed that the parties might stand committed to the prison of the *Fleet*, which was ordered accordingly. The order is, in substance, the same as in the present case. After stating the complaint, and referring to the evidence, it runs thus: "It is ordered that *Mary Read* and *John Hugginson*, for their contempt of this Court, do stand committed to the prison of the *Fleet*." So in *Morgan v. Jones* 10th July 1745, before the same learned Judge (Lord *Hardwicke*), the charge was that *Lettice Jones* had beaten the person who had served a subpoena upon her. The order, after stating the complaint set forth in the affidavit, proceeded thus: "It is ordered that the said
Lettice

(a) 2 *My. & Cr.* 316.

(b) 2 *R. & My.* 639.

(c) 2 *R. & My.* 674. n.

(d) 2 *Atk.* 469.

Lettice Jones be committed to the prison of the *Fleet* for her contempt in beating the person who came to serve the said subpoena." So in *Fotherby v. Preston* also, before Lord *Hardwicke*, on the 26th of *March* 1748, the complaint was, that *Parnell* had married a ward of the Court, and it was ordered that *Parnell* for the said offence, should stand committed to the prison of the *Fleet*. A like form of order was adopted in a similar case by the Lord Chancellor in *November* 1751, and by Lord *Eldon* in the case of *Priestley v. Lamb* (a). In the matter of *Quick*, 20th of *December* 1806, the petitioner complained of the publication of a case then before the Court, accompanied with reflections on the Court and the parties. It was ordered, (as in the present instance, without any express adjudication,) "that *Thomas Crowe* and *Mary* his wife, for their contempt in writing and causing the said writing to be printed and published, and the said *James Delahay* for his contempt in printing and publishing the same, do stand committed to the prison of the *Fleet*."

1845.

Ex parte
 VAN SANDAU.

It is unnecessary to proceed further in citing precedents of this nature, for although I consider the form of the order adopted by Lord *Cottenham* in *Lechmere Charlton's case* and the other forms to which I before referred as the more proper and correct forms, yet I cannot venture in the face of these precedents, to discharge the present order as insufficient and invalid.

Another objection made to the order is, that it directs the payment by Mr. *Van Sandau* of the costs of the application. It certainly is not usual in cases of commitment for contempt, to direct, in the order of commitment, that the party committed should pay the complainant's

(a) 6 *Vesey*, 421., and *Reg. Lib. B.* 1800, f. 525.

1845.

Ex parte
 VAN SANDAU.

complainant's costs. The ordinary course is to confine the order merely to the commitment. But when the party applies to be discharged, the Court, if it thinks proper, directs the payment of the costs as a condition of his liberation. I have been furnished with many precedents upon the subject, some of them, in cases of great and aggravated misconduct, in all of which the order of commitment is silent as to the costs, but which were afterwards ordered to be paid as a condition of the offender's discharge.

But although this is the usual course of proceeding, yet as the Court of Review had jurisdiction over the subject matter of the petition, it had a right to adjudicate as to the costs in the order of commitment by its general authority. In cases where application is made to commit for a contempt in the breach of an injunction, and the Court decides that a breach has occurred, but not a contemptuous breach, and there is, consequently, no commitment, the Court will order the Defendant to pay the costs of the application. *Bullen v. Ovey* (a), and *Leonard v. Attwell* (b) are instances of this. The inference from those cases is, that the postponement of any order as to the costs, where the party is committed, is merely a rule of convenience, and not binding on the Court.

A further objection has been made under this head that the order is not confined to costs, but directs the payment also of the petitioners' charges and expences. I think the order ought not to have gone to this extent. I must, therefore, direct it to be varied by striking out the words "charges and expences." The consequence will be, that if Mr. *Van Sandau* insists upon it, there
 must

(a) 16 *Vesey*, 141.

(b) 17 *Vesey*, 385.

must be a new taxation under this order. In other respects, the order must be affirmed.

1845.

Ex parte
 VAN SANDAU.

Next, as to the Order of the 8th of *February* 1844. It was founded upon an application to vary the minutes of the former order, but not upon the ground to which I have just adverted. There is no reason, therefore, to disturb this order, more especially as the minutes have no longer any operation, the order founded upon them having been passed and entered.

There is nothing to impeach the other order of the same date, the 8th of *February* 1844, or the two orders of the 17th of the same month of *February*.

This brings me to the consideration of the warrant under which Mr. *Van Sandau* was arrested, and which bears date on the 19th of *February* 1844. The original warrant was produced at the hearing. By some mistake or negligence the seal of the Court was not affixed to it. This is contrary to the 31st Order of the Rules and Orders of the 12th of *January* 1832, which requires that the process of the Court should be under the seal of the Court. Without, therefore, entering into the consideration of the other objections which were argued at the bar, I am of opinion that this defect rendered the warrant invalid.

Mr. *Van Sandau* afterwards applied for his discharge. Two orders of the same date, viz. the 21st of *February* 1844, the one a conditional and the other an absolute order, were made for his discharge. Considering that he had been apprehended under an insufficient warrant, I think I ought to discharge the conditional order. The other, of course, must remain. The consequence of discharging the conditional order

1845.


Ex parte
VAN SANDAU.

will be, that Mr. *Van Sandau* will be entitled to receive back the costs of that order.

The only question that remains to be decided, relates to the action depending in the Court of Queen's Bench.

I am of opinion, that the Plaintiff is entitled to a verdict against the Defendants upon the issue joined on the plea of Not Guilty. But adverting to all the circumstances before me, and to the fact that the action could have been maintained only in consequence of a defect in the course of the proceedings, I think very moderate damages will be sufficient to satisfy the justice of the case. I accordingly shall assess such damages at 10%. upon the whole record, and direct the Taxing Master of the Court of Bankruptcy to tax the costs of the action, as they would be taxed in the Court of Queen's Bench.

1845.

OLDFIELD v. COBBETT.

July 31.
Dec. 13.

THIS was a motion on behalf of the Defendant, who was sued as executor of his father, for leave to defend the suit in *formâ pauperis*. The motion was founded on an affidavit of the Defendant, stating, in addition to the usual declaration of poverty, that he had been prevented by an injunction from possessing himself of any assets. The application had been refused, but, as it was said, with some hesitation, by Vice-Chancellor *Knight Bruce*.

Mr. *Temple*, Mr. *Teed*, and Mr. *Addis*, appeared in support of the motion.

Mr. *Wakefield*, *contrâ*, raised a preliminary objection, that the Defendant had some time before been committed under an attachment for nonpayment of the costs of certain proceedings in the suit, and that, although he had been since discharged under the statute of 48 G. 3. c. 123. (a) (the sum for which he was detained being under 20*l.*), a discharge under such circumstances did not clear his contempt, or consequently entitle him to move, it being expressly provided by the statute that notwithstanding the discharge of any debtor under it the judgment whereupon he was taken or charged in execution should nevertheless continue and remain in full force to all intents and purposes except as to the taking of him in execution.

An application by a party sued as executor, for leave to defend the suit, in *formâ pauperis*, refused, though in addition to the usual affidavit, he swore that he had been prevented by an injunction from receiving any assets, and *semble*, the result would have been the same if he had sworn that there were no assets.


Semble, a party who is in contempt for non-payment of costs in the suit, is not thereby prevented from moving for leave to defend it in *formâ pauperis*.

Whether the discharge under the 48 G. 3. c. 123. of a party detained under process of contempt for

On

(a) Extended by 1 & 2 Vict. c. 110. s. 18., *vid.* *Tolson v. Dykes*, sup. p. 439.

nonpayment of costs under 20*l.* has the effect of clearing his contempt so as to entitle him to move. *Qu.*

1845.

 OLDFIELD
 v.
 COBBETT.

On the other hand, it was insisted that the discharge under the statute put an end to the contempt and to all disabilities consequent on it.

The LORD CHANCELLOR (after conferring with the Registrar) said:— I am told, Mr. *Wakefield*, that the circumstance of a party being in contempt is no objection to his making the common application to sue in *formâ pauperis*. What difference is there between that and a special application?

The argument then proceeded upon the merits.

In support of the motion, *Thompson v. Thompson* (a), and *Perrot v. Britten* (b), were cited; and *Paradice v. Shepherd* (c), in which a similar application was refused, was attempted to be distinguished on the ground that there was in that case nothing but the common affidavit, and therefore, for any thing that appeared, the Defendant might have had assets.

The LORD CHANCELLOR observed, that it appeared from the last edition of Mr. *Beames'* book on *Costs*, that both *Perrot v. Britten*, and *Thompson v. Thompson*, were decided on the ground, that the Defendant was beneficially interested, and on that ground only.

Dec. 13.

The LORD CHANCELLOR.

The Defendant, who was sued as executor of his father, moved for leave to defend in *formâ pauperis*. He relied upon an affidavit, in which it was stated that he was prevented from receiving, and did not receive
 any

(a) 1 *Dan. Pr.* 42.

(c) 1 *Dick.* 136.

(b) M. R. 18th *March* 1855,
 cited in *Beames' Costs*, 2d ed. p. 79.

any part of the testator's estate in consequence of an injunction issued before probate was granted.

1845.

 OLDFIELD
 v.
 COBBETT.

The right to sue in *formâ pauperis* originated in the statute of *Hen. 7.* This and the subsequent statute of *Hen. 8.* are confined to actions in the courts of common law, and do not extend to Defendants. The courts of equity have adopted the principle of these statutes, and proceeding further, have extended the relief to the case of Defendants. But in no instance has the privilege ever been exercised either by a Plaintiff or Defendant suing in a representative character, as executor or administrator.

Lord *Hardwicke*, in the case of *Paradice v. Shepherd* said, that "on search no precedent could be found either in Chancery or in the courts of common law, of the making an executor or administrator to sue or defend in *formâ pauperis.*" This judgment was given in the year 1745; a century has since elapsed, and no instance of any such permission has occurred during the whole of that period. This seems conclusive as to the rule and practice of the courts upon the question. But the case does not rest here: the point has been raised and decided in more than one instance. A motion similar to the present was made in a cause between the same parties before the present Master of the Rolls. Mr. *Cobbett* argued his own case. The motion was refused. It came before the Court a second time, when it was elaborately argued by Mr. *Cooper* for Mr. *Cobbett.* The Master of the Rolls adhered to his former decision, and stated in the course of his judgment, that the practice had been clearly ascertained by his immediate predecessor, Lord *Cottenham*, who had occasion to investigate the point when sitting at the Rolls. Upon the general question, therefore, no reasonable doubt can I think be entertained.

But

1845.

 OLDFIELD
 v.
 COBBETT.

But then it is said on the part of the Defendant, that the affidavit in *Paradice v. Shepherd* was merely in the common form, and that this was the ground of the decision; that here there is a special affidavit denying assets; and that the reasoning of Lord *Hardwicke* leads to the conclusion that upon such an affidavit he would have granted the application in *Paradice v. Shepherd*. But I think these observations are founded upon a misapprehension of the effect of what was stated by Lord *Hardwicke*. He came to the conclusion of what is the practice of the Court on three grounds. First, the resemblance of the language of the stat. of *Hen. 7.* to that of the statutes concerning costs which do not extend to executors or administrators. Secondly, the absence of any instance in which either Plaintiff or Defendant was allowed to sue or defend *in formâ pauperis* as executor or administrator. And, thirdly, the form of the affidavit in common use, which, he says, applies only to the ordinary case of a Plaintiff or Defendant, and is not so framed as to comprehend the case of an executor or administrator. This is the whole effect of Lord *Hardwicke's* observations in the case of *Paradice v. Shepherd*, and there is nothing, I think, leading to the conclusion that he would have considered an affidavit stating that the executor had no assets, a sufficient ground for departing from the rule.

The affidavit, indeed, in this case does not state that there are no assets, but that none have come to the Defendant's hands, by reason of the injunction. I think such an affidavit will not take the case out of the general rule. No authority has been cited for that position, nor is such an exception any where hinted at, although cases of a similar nature must have frequently occurred. If the Defendant has conducted himself with propriety, he will be allowed his costs out of the testator's estate.

Something

Something was said as to the hardship of the case, but it must be recollected that in the Courts of common law which are governed by the statute, a Defendant is not allowed, even when defending in his own right, to defend *in formâ pauperis*. I am of opinion, therefore, that the motion must be refused; but as it seems to have been in some degree countenanced by the Vice-Chancellor *Knight Bruce*, it must not be with costs.

1845.

 OLDFIELD
 v.
 COBBETT.

MAN v. RICKETTS.

Nov. 13.
 Dec. 20.

THE LORD CHANCELLOR.

This was an application to discharge an order made by the Master of the Rolls. The material facts were these: — The suit was instituted by *Man*, the creditors' assignee, and *Lackington*, the official assignee of the bankrupt, to procure the sale of an estate. *Man* died, and the suit was afterwards prosecuted to a hearing by *Lackington*, and a decree obtained. *Lackington* died soon afterwards, and *Turquand* was appointed official assignee in his place. He procured the decree to be drawn up and passed. Application was made to the Master of the Rolls for an order that *Turquand's* name might be substituted for that of *Lackington* in the suit, and an order was made accordingly.

The creditors' assignee and the official assignee have by the 1 & 2 W. 4. c. 56., s. 25. a joint title to the bankrupt's estate, so that if one of them die pending a suit in which they are co-Plaintiffs, the suit may be continued by the other.

The 67th section of the 6 G. 4. c. 16., which provides that a suit shall not abate by the death or removal of an assignee, but that it shall be prosecuted in the

It was contended by Mr. *Wakefield* that the learned Judge had no authority to make such an order. Much of his argument turned upon the assumption that the

official

name of the assignee "chosen" in his place, applies, since the incorporation of that act with the 1 & 2 W. 4. c. 56., to official assignees as well as to creditors' assignees.

1845.

 MAN
 v.
 RICKETTS.

official assignee and the creditors' assignee were not joint tenants of the estate, their title accruing at different periods and from different persons. There is no foundation for such an opinion. By the twenty-fifth section of the 1 & 2 W. 4. c. 56. deeds of assignment are dispensed with, and the estate vests in the same manner as if such deed or deeds had been actually executed. But if this provision had not been made, the commissioners would have assigned the estate to the official assignee; and after the choice of the creditors' assignee, a second assignment would have been made to both of them jointly. It follows, therefore, as the estate vests as it would have done if there had been the usual assignment, that they have a joint title; and this is in conformity with the twenty-second section of the act, in which it is enacted that the official assignee shall be an assignee of the bankrupt's estate and effects, *together with* the assignee chosen by the creditors. Upon the death of *Man*, therefore, the whole estate became vested in *Lackington* the survivor. Upon his death a new official assignee, *Turquand*, was appointed. But by the sixty-seventh section of 6 G. 4. c. 16., if an assignee die the suit shall not abate; but the Court may order the name of the new assignee to be substituted for that of the former assignee, and the suit shall proceed as if it had been originally commenced in his name. This clause is by the sixteenth section of the 1 & 2 W. 4. c. 56. incorporated into that act, and authorises the order made by the Master of the Rolls.

It was said that the sixty-seventh of 6 G. 4. c. 16. applies only to assignees who are *chosen*, and that it is confined, therefore, to creditors' assignees, and does not extend to official assignees, who, it is said, are *appointed* and not *chosen*. But the Court would not, I conceive, be justified in putting this narrow interpretation upon the
 the

the act after its incorporation into the 1 & 2 *W. 4.*, which creates this new class of assignees, and thereby prevent its application to the case of the official assignees who come distinctly within the mischief which it was the object of the act to prevent. I am of opinion, therefore, that the order is correct, and that this application must be dismissed, with costs.

1845.
MAN
v.
RICKETTS.

See *Lloyd v. Waring*, 1 *Coll.* 536.

ANDREWS *v.* WALTON.

Dec. 17.

THE LORD CHANCELLOR.

This was a motion to discharge the Plaintiff *Andrews* out of custody in respect of a writ of attachment issued into *London* on the 4th of *February* 1843, and returnable immediately; and the principal ground upon which the Plaintiff relied in support of the motion was, that a former writ of attachment founded upon the same contempt had issued into *London* on the 12th of *January* preceding, and which writ of attachment was also returnable immediately.

It is no objection to the regularity of a writ of attachment, that another similar writ has previously issued against the same party, but which has not been acted on.

It was contended that the second writ of attachment could not regularly be issued, the former being in force, as it was said, at the time when the second writ was issued. Upon this point of practice I have thought it right to consult the officers of the Court, and they have returned the following certificate: —

“The

1845.

ANDREWS
v.
WALTON.

“The clerks of records and writs are not aware of any rule which prevents a party abandoning unexecuted process, which from any cause he considers it either unsafe or inexpedient to act upon, and beginning *de novo*. From the circumstance of the second attachment being founded upon a new affidavit, that was evidently the case here. It was imperative upon the party suing out the writ and at his peril, either to withdraw or otherwise take care that no further proceedings were taken upon the first attachment, and, subject to that condition, the clerks of records and writs are of opinion that the second attachment was not irregular.”

I think the other grounds insisted upon are equally untenable. The motion, therefore, must be refused, and with costs.

BROWN v. BAMFORD.

May 8.

1846.

June.

Gift by will
of leasehold
and other per-
sonal estates
to trustees in
trust to pay
the rents &c.
to such per-
son or persons
as a married

woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, and, in default of such appointment, or so far as the same should not extend, into her proper hands for her sole and separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges, and after her death in trust for her children. Held, upon the particular terms of the gift, that the restraint on anticipation applied to an assignment, by the married woman, of her separate estate as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts *alone* should be good discharges.

JOHN BECKETT, by his will, dated the 21st of September 1832, gave certain leasehold houses and stock in the funds to trustees, upon trust, from time to time during the natural life of his daughter *Sophia Bamford*, or until she should be duly declared a bankrupt, or take the benefit of any act for the relief of insolvent

solvent debtors to pay the clear rents, interest, dividends, and proceeds thereof unto such person or persons for such intents and purposes, and in such manner as *Sophia Bamford* by any writing or writings under her hand, when, and as the same should become due, but not by way of assignment, charge, or other anticipation thereof should, notwithstanding her then present or any future coverture, direct or appoint; and in default of any such direction or appointment, or so far as the same, if incomplete, should not extend, into her proper hands for her sole and separate use, independent of the debts, control, or interference of her then present or any future husband; for which purpose, the testator thereby directed that the receipts in writing, under the hand of his daughter *Sophia Bamford* should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, interest, dividends, and proceeds, or so much thereof as should in such receipts, respectively, be expressed to have been received; and from and after the decease of his daughter *Sophia Bamford*, or such her bankruptcy or insolvency as aforesaid, which should first happen, then in trust for all and every, or such one or more of her children as therein mentioned.

1845.
BROWN
v.
BAMFORD.

Sophia Bamford having, by a paper writing under her hand, undertaken to guarantee a debt due to the Plaintiffs from her son-in-law, who afterwards became bankrupt, this bill was filed praying a declaration that her income, under the deed, was liable to make good the debt, and for consequential relief. *Sophia Bamford*, her husband, and the trustees of the will put in a general demurrer to the bill, which the Vice-Chancellor of *England* allowed. (a)

The

(a) 11 Sim. 127.

1845.


BROWN
v.
BAMFORD.

The Plaintiff appealed from that decision, and, after the appeal had been argued by Mr. *Bethell* and Mr. *Baily* for the Appellant, and Mr. *Stuart* and Mr. *Simpson* for the Respondent, the Lord Chancellor expressed an opinion in conformity with that of the Vice-Chancellor; but afterwards desired that the case might be re-argued by one counsel on each side.

The appeal was, accordingly, now re-argued by

Mr. *Bethell* for the Appellants.

Mr. *Stuart* for the Respondents.

In support of the appeal, it was contended, that the doctrine on which the Vice-Chancellor's judgment was founded — that, under a settlement in this form, a married woman took, collaterally to her limited power of appointment, an estate in the property, which she might deal with to an extent beyond that to which she was restricted in the exercise of the power, — was inconsistent with the history of many previous cases. In *Pybus v. Smith* (a), for instance, where there was no express restraint on anticipation, the argument mainly turned upon whether such a restraint could be implied from the words “from time to time,” in the clause relating to the power — a question which would have been quite immaterial, if the wife had been supposed to have an absolute estate which she could deal with independently of the power. The same observation applied to *Ellis v. Atkinson* (b) and *Barton v. Briscoe*. (c) Equally inconsistent, it was said, with such a doctrine was the language of Lord *Eldon* in *Jackson v. Hobhouse*

(a) 5 B. C. C. 340.

(c) Jac. 603.

(b) *Ibid.* 565.

Hobhouse (a) and *Parkes v. White*. (b) “If the contract,” observed his Lordship in the latter case, “makes her a feme sole, her faculties, the nature and extent of them, are to be collected from the terms of the instrument making her such :” now one of those faculties was the *facultas disponendi*, which, according to Lord *Eldon*, was not to be implied as incident to the estate, but to be regulated, as it was created, by the express terms of the instrument. In *Chassaing v. Parsonage* (c), where the property of a female ward of Court was settled under the direction of the Court, with a clause against anticipation, the limitation, in default of appointment, was the same as in the present case. And in *Moore v. Moore* (d) before Vice-Chancellor *Knight Bruce*, and *Harnett v. M'Dougal* (e) before the Master of the Rolls, where the same question arose on instruments not substantially different from the present, and this decision of the Vice-Chancellor of *England* was cited, those learned Judges had refused to follow it.

1845.
BROWN
v.
BAMFORD.

On the other hand it was said, that the doctrines of the Court, with respect to separate property and its incidents, had been so greatly modified and extended by recent decisions, particularly that of *Owens v. Dickenson* (g), that no inference could be drawn from the apparent inconsistency which had been suggested between the reasoning adopted in the older cases, and the principle of the decision now under appeal. That the only thing which those cases could now be legitimately cited to prove, was, that an intention to restrain a feme covert in the power of disposing of property given to her separate use, must be expressed in clear and unequivocal terms, or the Court would not give effect to it. *Medley v. Horton*.

(a) 2 *Meri.* 483.

(d) 1 *Coll.* 54.

(b) 11 *Ves.* 209. See page 321.

(e) *M. R. February* 1845.

(c) 5 *Ves.* 15.

(g) *Cr. & Phill.* 48.

1845.


BROWN
v.
BAMFORD.

fon. (a) And that in this case, the will not having provided that the receipts of the married woman should *alone* be sufficient discharges, she took the property, so far as her estate, (as distinguished from the power), was concerned, without restriction: for that there was no reason why the distinction between a power and an estate, which had been laid down in *Cox v. Chamberlain* (b) and *Roach v. Wadham* (c), should not apply to the separate estate of a married woman as well as to other cases. *Barrymore v. Ellis.* (d)

1846.
June.

The LORD CHANCELLOR.

This was an appeal from an order of the Vice-Chancellor of *England*. When the case came first before me, I expressed an opinion upon it, in accordance with the judgment of the Vice-Chancellor; but afterwards, entertaining doubts as to the correctness of that opinion, I directed the case to be again argued. The result of that argument, and the subsequent consideration of the case, have led me to change the opinion I had previously formed. [His Lordship here read the clause of the will on which the question arose, and proceeded:—]

It was obviously the intention of the testator, that the income of this property should be kept entire, for the use of his daughter, and that it should not be charged or disposed of, except as the successive payments should become due—that it should not, in any way, be anticipated. It cannot reasonably be supposed that he would be so careful as he evidently was to exclude one mode of anticipation, and, at the same time, mean to have the property subject to alienation, even to its full extent, in another form.

The

(a) 8 *Jur.* 853.

(b) 4 *Ves.* 631

(c) 6 *East*, 289.

(d) 8 *Sim.* 1.

The question, therefore, is, whether the terms made use of by the testator, are sufficient to enable the Court to give effect to that intention.

1846.
BROWN
v.
BAMFORD

The trust is to pay the rents &c., “to such person as *Sophia Bamford*, by any writing under her hand, when and as the same shall become due, but not by way of assignment, charge, or other anticipation thereof, shall direct or appoint, and in default of any such direction or appointment, or so far as the same, if incomplete, shall not extend, into her proper hands, for her sole and separate use.” The right to appoint is not to be exercised till the rents or other income become due, and then only to the extent of what is so due. In default of any such appointment, the rents &c. then due, and those only, or so much of them as shall not have been appropriated by the appointment, are to be paid into her own hands. All this is very clearly and precisely expressed.

The negative words in the clause, viz. — “But not by way of assignment, charge, or other anticipation,” remain to be considered. The question depends upon the effect of these words. The daughter *Sophia Bamford* is not allowed, by means of any assignment, charge, or other anticipation, to direct the payment or application of the rents &c. by the trustees. But any assignment, charge, or anticipation, if effectual, would operate as a direction; and this was evidently so considered by the testator or other person who framed this clause. The effect, therefore, of the prohibition is, to restrain *Sophia Bamford* from assigning, charging, or in any manner anticipating the income, or exercising any dominion or control over her life estate, except in the form, and under the restrictions, contained in the power of appointment. She is precluded from assigning,
T t 3 charging,

1846.

BROWN

v.

BAMFORD.

charging, or in any manner anticipating the rents or other income, but she is permitted when and as they become due, but not before, to direct the application of them, and in default of any such direction, they are to be paid into her own hands. I think this is the true construction of the clause, and it corresponds with what I consider to have been the intention of the testator, viz. — that the continuance of the income during his daughter's life, should be secured for her benefit.

The case does not depend, in any degree, upon the terms of the receipt clause. The observations of the learned Judge, upon this point, appear to have arisen from what occurred incidentally in the course of the discussion. I certainly do not understand that the decision was rested upon any such ground. His Honour considered that the case came within the principle upon which he had decided that of *Barrymore v. Ellis*, viz. — that where a limited power of appointment is created, and, in default of the execution of such power, the estate is given generally to the same person, it is competent to the donee to dispose of the estate without regard to the power; the execution of which he is at liberty to waive or abandon.

The question, however, is not as to the principle so stated, but as to the application of it to the present case. I think it has no such application; that the restriction against anticipation extends to the whole gift; that this is the true construction of the bequest, and that it corresponds with what appears to have been the manifest intention of the testator.

I may further observe, that the clause in question, is, in all its material parts, the same as in the settlement
stated.

stated in the case of *Barton v. Briscoe*. (a) That case was very much considered, both by the Court and at the bar; but it would have been wholly unnecessary to discuss the important question there decided, if it had been supposed that the clause would have admitted of the interpretation put upon it in the present instance by the Vice-Chancellor.

1846.
BROWN
v.
BANFORD.

The appeal must be allowed, and the demurrer allowed, but without costs.

(a) *Jac.* 603.

BAGGETT v. MEUX.

March 19.

ON the hearing of an appeal in this case from the decree of Vice-Chancellor *Knight Bruce* (a) the argument turned chiefly on the question, whether a clause in restraint of alienation, annexed to a legal devise, in fee, of real estate to a married woman for her separate use, was effectual during the coverture.

A court of equity will give effect during coverture to a clause in restraint of alienation, annexed a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or only for life.

Mr. *Russell* and Mr. *Freeling*, for the Appellant, in support of the negative, attempted to distinguish the case of real from that of personal estate, on the ground that both the property of a married woman in the latter, and her power of disposition over it, being creatures of equity, might, by the same jurisdiction, be modified and restricted to any extent; but that in the case of real estate, which a married woman had power to dispose of by the common law, that power could not be controlled by

(a) See 1 *Coll.* 139., where a detailed statement of the case will be found.

1846.

BAGGETT

v.

MEUX.

by the terms of the gift, any more than in the case of a male. They also observed that the *Irish* Fines and Recoveries Act (*a*) contained an express proviso that the clauses relating to conveyances by married women should not apply to cases in which there was, by the terms of the gift, a restraint on alienation; whereas there ~~was~~ no such proviso in the *English* Act.

In answer to which,

The LORD CHANCELLOR observed, that the *Irish* Act was subsequent in date to the other, and that he took that clause to be an expression by the legislature of what was meant by the former Act.

Mr. Swanston and Mr. Busk, *contra*.

The LORD CHANCELLOR, after disposing of the other points of the case in a few words, said, with respect to this: — After the case of *Tullett v. Armstrong* (*b*), there can be no doubt about the doctrine of this Court respecting the property given to the separate use of a married woman: and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal: but a Court of Equity having created in both a new species of estate, may in both cases modify the incidents of that estate.

Appeal dismissed, with costs.

(*a*) 4 & 5 W. 4. c. 92. s. 79.

(*b*) 4 My. & Cr. 377

1845.



FOSTER v. SMITH.

1845.
March 4. 6.

THE question in this case arose upon the construction of a will, by which the testator devised his freehold and leasehold estates to trustees, on trust to receive the rents, issues, and profits thereof, when and as they should become due and payable, and thereout to pay to his wife, if she should survive him, the clear annuity of 200*l.* during the term of her natural life, for her sole and separate use, and not to be subject to the control or engagements of any future husband; the said annuity to be paid by four equal quarterly payments, on *Lady-day*, *Midsummer-day*, *Michaelmas-day*, and *Christmas-day*, without any deduction for taxes; the first quarterly payment to be made on such of the said days as should happen next after the testator's decease and from and immediately after the decease of his wife, then upon this further trust, that they, his said trustees, or the survivor &c., should convey and assign his said freehold estate unto and to the use of his three sisters, their heirs and assigns for ever as tenants in common: and upon this further trust, as to his said leasehold estate, that upon and immediately after the decease of his said wife, they, his said trustees, or &c., should assign all and singular his said leasehold premises to his said three sisters, to hold to them, their executors, &c., for all the residue of the terms which might then be unexpired therein, in equal shares, and upon and for no other use, trust, or purpose whatsoever. And he named the same three sisters his residuary legatees.

Upon a devise of real estates in trust, to receive the rents, and thereout to pay to the testator's widow an annuity, and "from and immediately after her death" to convey the estates to his three sisters, Held, (reversing the decision below), that the annuity was a charge only on the rents which accrued during the life of the widow, and not on the corpus of the estates.

The testator died in 1823. For some years after his death the rents of the estates were sufficient to pay the annuity

1845.

FOSTER
v.
SMITH.

annuity to the widow; but afterwards they became insufficient; and upon her death in *July* 1839, there was an arrear of 466*l.* due to her, which her executors prayed by this bill might be raised by sale or mortgage of the estates. And the Vice-Chancellor *Knight Bruce* being of opinion that the annuity was a charge on the corpus of the estates, decreed accordingly. (a)

An appeal by the sisters from that decision now came on to be heard.

Mr. *Anderdon* and Mr. *Willcock*, for the Plaintiffs in support of the decree.

The primary intention of the testator was to make a certain, definite and specific provision for his widow. All the other directions in the will are subsidiary and secondary to that, and, unless clearly inconsistent, must bend to it; *Arundell v. Arundell* (b), *Boyd v. Buckle*. (c) The direction to pay the annuity out of the rents and profits "as and when they accrue," which will be relied on by the Appellants, was merely to give permanence to the provision, and to prevent anticipation; although technically it might not be sufficient for that purpose. A trust to be performed out of rents and profits will be construed a charge on the corpus, unless there is something in the context inconsistent with such construction; *Allan v. Backhouse*. (d) Here, the only indication of a contrary intention is the direction "from and immediately after the death of the widow, to convey the estates to the sisters." But in *Baines v. Dixon* (e), where there was a similar direction, Lord *Hardwicke* says, "There have been many cases of devises to trustees to pay debts out of profits, and then to convey the lands :

(a) See 2 *Y. & Coll. C. C.* 193.

(d) 2 *Ves. & B.* 65.

(b) 1 *Myl. & K.* 316.

(e) 1 *Ves. Sen.* 41.

(c) 10 *Sim.* 595.

lands: yet that shall not hinder a sale, and never has been thought sufficient to limit profits to *annual* profits, which would overturn many cases." In this case, "from and immediately after her decease," means, after satisfaction of the previous trusts.

1845.

FOSTER
v.
SMITH.

The LORD CHANCELLOR.

The testator evidently did not contemplate that the rents would be deficient: it is impossible to speculate on what he would have done if he had foreseen the deficiency. The only question is, what the words import. You propose to introduce another term — that if the rents be insufficient, then the trustees shall continue to receive the rents after the death of the widow until the annuity shall be satisfied, and then convey. It would be a very different thing if there were, in the first instance, a gift of an annuity, and a charge of it upon the estate, and then a direction to the trustees to pay it out of the rents.

Mr. Anderdon.

If the intention had been, to confine the charge to the rents which should accrue during the life of the annuitant, the obvious way of giving effect to it would have been to limit the estate to the trustees during her lifetime, and then over to the sisters.

Mr. Wigram and *Mr. Toller*, for the Appellants.

The principle of *Allan v. Backhouse* and that class of cases is founded upon the necessity of raising a gross sum at a particular time, and has but little application to a case like the present. And what Lord *Hardwicke* says in *Baines v. Dixon* refers to the debts, not to the legacies, which he held to be payable out of the annual rents only, and not out of the corpus, relying upon the words

1845.

FOSTER
v.
SMITH.

words "as the profits of the estate should advance the money." There is, at least, as strong an indication of a similar intention here in the direction to pay the annuity out of the rents "as and when they should accrue," and to convey the estates "from and immediately after the death of the widow." The Court is asked to say that the estate shall not go over in the very event in which the will says it shall. The cases of analogy mentioned by the Vice-Chancellor are cases in which the Court held that the estate should go over in an event which, though not actually specified by the testator, was evidently within the meaning of the events which he had specified; for instance, the event of there being no child was considered to be included in the event of all children dying under twenty-one, as if the event expressed had been that of no child attaining twenty-one. *Kendall v. Russell* (a) has but slight resemblance to this case; but, so far as it goes, it is in favour of the Appellants.

Mr. *Anderdon*, in reply.

The LORD CHANCELLOR, after stating the will and the circumstances out of which the question arose, proceeded as follows: —

There can be no doubt that, if the trust had simply been to receive the rents, issues, and profits of the estates, when and as the same should become due and payable, and thereout to pay to his wife, if she should survive the testator, an annuity of 200*l.* for her life, that this would have been a charge upon the rents &c., until the whole amount of the annuity with the
arrears

(a) 5 *Sim.* 424.

arrears had been paid. And the trustees after the death of the widow would have been bound to apply the rents, &c. accordingly. But in this case a new trust arises on her death ; for the trustees are directed, “ from and immediately after ” that event, to convey the estate to the sisters ; and if they perform their trust, which I think they are bound to do, they would be disabled from applying the subsequent rents to the discharge of the arrears. To obviate this, it is proposed to construe the direction to convey to the sisters on the death of the widow, as if it had been a direction to convey, subject to the annuity. But this would be essentially to alter the testator’s will ; in fact to make a new will. And I think there is nothing in the will to justify it.

The testator seems to have considered that the rents &c. would have been more than sufficient to pay the annuity, and he gives whatever surplus there might be to his sisters, together with the estates on the death of the widow. What he might have done if he had foreseen that the rents would have been insufficient to pay the annuity, it is impossible, I think, with any certainty to determine.

Viewing the case in this light, I am compelled to differ from the Vice-Chancellor in the interpretation he has put upon this will, which however, his Honour does not appear to have considered as altogether free from doubt.

1845.


FOSTER
v.
SMITH.

1846.

1846.
Jan. 16, 17. 24.

All applications for leave to amend under the 68th Order of *May* 1845, are to be made in the first instance to the Master.

Where the General Orders require an affidavit of the solicitor, an affidavit of the solicitor's clerk is not sufficient; but in cases where the facts to be deposed to are within the personal knowledge of the clerk only, the Court may require an affidavit from both.

CHRIST'S HOSPITAL v. GRAINGER.

IN this case the bill having been once amended after answer, and the last answer to the amended bill having been filed on the 20th of *June* 1844, the Plaintiffs, on the 30th of *October* 1845, gave notice for the 2d of *November*, of a motion before the Vice-Chancellor of *England*, for leave to re-amend the bill without requiring a further answer. The Vice-Chancellor having granted the application and with costs, a motion was now made before the Lord Chancellor, on behalf of three of the Defendants, to discharge the Vice-Chancellor's order, and that the bill as amended pursuant thereto might be taken off the file on the ground — 1st. That the original application ought to have been made to the Master and not to the Court. 2dly. That the affidavits on which it was founded were insufficient, it being contended on the part of the Defendants, that the case was to be governed by the General Orders of *May* 1845, and not by those of *April* 1828.

The affidavits were all made by the managing clerk of the Plaintiff's solicitor, with the exception of one, which was made by the solicitor himself. The affidavits of the clerk, after giving the history of various attendances at *Reading* for the inspection of certain documents mentioned in the schedule to the Defendant's answer, and on the voluminous nature of which he mainly relied as a justification of the delay, concluded by stating, that the proposed amendment of the bill was not intended for the purposes of delay or vexation; but, because the same was considered to be material

material to the Plaintiff's case. The affidavit of the solicitor himself contained the same statement, and also a statement that the draft of the proposed amendments had been settled, approved, and signed by counsel. It contained, however, no statement as to reasonable diligence having been used; and the only part of it which went to the materiality of the amendments, was a statement that the Plaintiffs thereby sought to limit and vary the allegations in the bill respecting the acts and dealings of the Defendants, in regard to the estates in question in the cause.

1846.
CHRIST'S
Hospital
v.
GRAINGER.

Mr. Bethell and Mr. Selwyn, for the appeal motion, cited *Phillips v. Goding* (a), *Winnall v. Featherstonehaugh* (b).

Mr. James Parker, Mr. Teed, and Mr. Freeling, *contra*, cited,

On the question of jurisdiction, *Lloyd v. Wait* (c), *Haddlesea v. Neville* (d), *Dean v. Hickinbotham* (e), *Wembourne Union v. Masson* (g), *Matchitt v. Palmer* (h)

On the application of the New Orders of May 1845, to proceedings pending at the time of their promulgation, *Routledge v. Gibson* (i), *Spencer v. Allen* (k)

The LORD CHANCELLOR.

Jan. 24.

This was an application to discharge an order of the Vice-Chancellor of *England*, by which leave was given to

(a) 1 *Hare*, 40.

(b) 9 *Jur.* 1054.

(c) 4 *Myl. & Cr.* 257.

(d) 4 *Beav.* 28.

(e) 4 *Hare*, 502.

(g) 7 *Beav.* 309.

(h) 10 *Sim.* 241. And the cases collected in 9 *Jur.* 1002.

1054. and 1079.

(i) 13 *Sim.* 493.

(k) 15 *L. J. N. S.* 31.

1846. .

 CHRIST'S
 Hospital
 v.
 GRAINGER.

to the Plaintiffs to amend their bill after the expiration of forty days, from the filing of the last answer.

Various points were made at the bar with respect to the order. The first question raised was, whether the motion was to be governed by the Orders of *April* 1828, or by those of *May* 1845. The latter orders were published in the month of *May* of that year, and were to come into force on the 28th of *October* following. Ample notice, therefore, was given of them to the profession and to the public. Notice of the motion before the Vice-Chancellor was given for a day subsequent to the 28th of *October*. The notice itself was served on the 30th. By the first of the Orders of *May*, it was enacted that the Orders of *April* 1828, enumerated in that Order, were to be abrogated from the time when the Orders of *May* came into operation, and among the orders specially mentioned as abrogated are the 13th and 15th relating to amendments; it seems therefore difficult to contend, that a motion, which by the terms of the notice was not to come on until a day subsequent to the 28th of *October*, is to be governed by the Orders of *April*, and not by those of *May*. But it was said, that to hold the contrary would in this case be to give to the New Orders a retrospective effect, inasmuch as they require an affidavit of reasonable diligence having been used during a period in which the old Orders, which required no such affidavit, were in operation. My answer to that is, that these Orders merely differ from the former in regulating the evidence of facts, in the absence of which the Court would never have been justified in allowing an amendment. If there were any circumstances to shew that what was, previously to the promulgation of these orders, considered as reasonable diligence, is by reason of any thing contained in these orders considered so no longer

longer, those circumstances would be taken into consideration in this case. There is, however, authority on the point, in a decision of the Vice-Chancellor himself in *Winnall v. Featherstonhaugh*. That was even a stronger case than the present, for there notice was given in the early part of 1845, for a day in *April*, on which, under ordinary circumstances, the motion would have come on before the promulgation of the New Orders, and yet because, owing to the pressure of business in the Court, it did not in fact come on till after the 28th of *October*, the Vice-Chancellor held that it was governed by the New Orders. Whether that was a right decision or not in the circumstances of that case may be a question, for I understand that the case is now under appeal (a): but Mr. *Parker* seemed to consider that that must be the conclusion in this case, for he stated that the affidavits were inadvertently framed with reference to the Old Orders, and he argued, that, when properly and fairly considered and interpreted, they were sufficient to justify the application under the new orders.

1846.
CHRIST'S
Hospital
v.
GRAINGER.

The next point was, that the application ought to have been made to the Master, and not to the Court. The 3 & 4 *W. 4. c. 94. s. 13.* directs that all applications for leave to amend shall be made to the Master in such manner, and under such rules and regulations as the Court should by any general order direct, and also subject to an appeal to the Court. The Orders in question of *May* 1845, are the only general Orders now in force which relate to the matter. And the 68th of those Orders says, that such applications are to be made in a certain manner, and subject to certain regulations as to the frame of the affidavits on which they

(a) The decision was afterwards reversed.


1846.

CHRIST'S
Hospital
v.
GRAINGER.

they are to be founded; but it contains no restriction as to the time within which the application may be made. In that respect, it differs from the corresponding Order of *April*, which contained negative words to the effect that no applications to amend the bill should be made either without notice or upon affidavit, unless obtained within a certain time after the filing of the answer. In the absence of any such restriction in the new orders, I see nothing in them to authorise the Court to take cognizance of this application. It is true there are cases in which the Court, from the peculiar nature of the application, has thought that it ought to be made to the Court in the first instance, and not to the Master. These cases are enumerated by the Master of the Rolls, in *Strickland v. Strickland*; but this is not one of them, and I think, therefore, that this application ought to have been made to the Master. I have consulted some of the other Judges, who concurred with me in the publication of these Orders, and they agree with me in that opinion. That being the case I might rest the decision on this point alone, but there is another question, as to the affidavits, on which it seems to me desirable that I should express my opinion.


The New Orders require that, after the expiration of four weeks from the time when the last answer is to be deemed sufficient, the affidavit shall state not only that the draft of the proposed amendments has been settled, approved, and signed by Counsel, and that the amendment is not intended for delay or vexation, which is all that is required before the expiration of that time, but further that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill. That affidavit is to be made both by the Plaintiff and his solicitor, except where the Plaintiff, from being abroad or from any other reason, is unable to join therein, in which

which case it is sufficient if made by the solicitor alone. Here the Plaintiffs, being a corporation, are unable to make the affidavit, and therefore the affidavit of the solicitor alone would be sufficient. Two affidavits have in fact been filed, one by Mr. *Maberley* the solicitor, and the other by his managing clerk. In the affidavit, however, of Mr. *Maberley* there is nothing to satisfy the requisition of the 68th Order. I could hardly come to the conclusion from that affidavit that the matter of the amendments was material. It is not sworn that they are material: facts, indeed, are stated as leading to that conclusion; but not in such a way as to satisfy me upon the point. It is not, however, necessary to insist on this defect; because the affidavit does not go on to swear as to reasonable diligence. On this ground, therefore, I could not have supported the order of the Vice-Chancellor.

1846.

 CHRIST'S
 Hospital
 v.
 GRAINGER.

But then the affidavit of the managing clerk is called in aid, and it is said that his affidavit is worth more than that of the solicitor, inasmuch as he is naturally more acquainted with the details of the proceedings than the solicitor himself, who is represented as not having personally attended to them. But I am not at all of that opinion. The Court requires, in all cases, the guarantee of the solicitor's oath. It may be that the clerk may know more of the details of what passes in the office with reference to a particular suit than the solicitor himself; and the Court in such cases might require not only the solicitor's affidavit, but also that of the clerk; but at all events the Court requires the sanction, which the character, position, and responsible station of the solicitor is capable of giving to the affidavit.

That being my opinion, it is unnecessary to enter into the detail of the explanation given of the delay. The

1846.

 CHRIST'S
 Hospital
 v.
 GRAINGER.

Vice-Chancellor seems to have considered it satisfactory, and though the affidavit does not in terms come up to the requisition of the Order, I should have hesitated on the facts stated, before I came to a different conclusion. It is unnecessary, however, to consider that question, for I think the order must be discharged for the reason I have already given. The amendment will of course be taken off the file.

Order discharged.

Jan. 20.

NEEDHAM v. NEEDHAM.

Acts amounting to waiver of irregularity in an attachment, though not available in answer to an application by a prisoner for his discharge, are available where the party has obtained his discharge, and where his only object in impeaching the attachment is to set aside subsequent proceedings founded upon it.

THE Defendant, Colonel *Needham*, being in contempt for not putting in his answer, on the 19th of *January* 1842 an attachment issued against him under which he was taken into custody on the 21st of *January*. On the 21st of *February* following, he was brought to the bar of the Court, and an order was made that he should be remanded, and that a *habeas* should issue to bring him again to the bar of the Court, in order that

that

A *habeas* was issued under the usual order to bring up a Defendant in contempt, for the purpose of a motion to take the bill *pro confesso* against him; on his being brought up the motion was refused with costs, but that decision was reversed on appeal, and a new *habeas* was afterwards issued under the same order for the purpose of a renewal of the motion. Held, that the second *habeas* was regularly issued without a new order for it, on the ground that, owing to a mistake of the Court, the original order had not been satisfied by the first *habeas*.

Where a bill against several Defendants has been taken *pro confesso* against one, the clerk of records attending for that purpose with the record, it is not the practice to require the clerk's attendance a second time on the hearing of the cause against the other Defendants.

Under the 5th Rule of 11 *G. 4.* & 1 *W. 4. c. 36. s. 15.*, if the thirty days therein mentioned expire out of term, the Defendant may be brought up to the bar of the Court at any time during the vacation, without waiting for the four first days of the following term.

that the bill might be taken *pro confesso* against him. Such *habeas* was accordingly issued, under which, on the 13th of *April*, he was brought up a second time before the Vice-Chancellor of *England*, when a motion made to take the bill *pro confesso* was refused with costs. But that order of the Vice-Chancellor being afterwards discharged by the Lord Chancellor, the motion was renewed before the Vice-Chancellor on the 9th of *May*, on which occasion the Defendant was brought up to the bar of the Court upon a new *habeas*, issued under the Order of the 21st of *February*; and the bill was then ordered to be taken *pro confesso* against him. A decree founded upon that order and reciting it, was subsequently made in the suit by Vice-Chancellor *Wigram*, to whom the cause had been transferred.

1846.

 NEEDHAM
 v.
 NEEDHAM.

After several ineffectual attempts on the part of the Defendant to set aside those proceedings, and after he had taken part in several attendances before the Master under the decree, he now moved before the Lord Chancellor to set aside all the proceedings from the attachment inclusive, on the ground of irregularity,

1st. In the attachment itself.

2dly. In the order to take the bill *pro confesso*.

3dly. In the decree.

Mr. *Cooper* and Mr. *Teed*, for the motion.

Mr. *Calvert*, *contra*.

The objection to the regularity of the attachment was, that it had issued before the Defendant had been served with notice of the cause having been attached to any

1846.

NEEDHAM

v.
NEEDHAM.

particular branch of the Court under the General Order of the 11th of *November* 1841.

The objection to the order for taking the bill *pro confesso* was threefold.

1st. That the order of the 21st of *February*, on which it was founded, was irregular, being made in vacation and not on a seal day.

2dly. That at the time when the order to take the bill *pro confesso* was pronounced, the Defendant was entitled to his discharge without payment of costs, not having, as it was contended, been brought up to the bar according to the requisitions of the 5th rule of Sir *Edward Sugden's Act.* (a)

3dly. That there was no warrant for the *habeas* under which the Defendant was brought up on the 9th of *May*, except the Order of the 21st of *February* which, it was contended, had been satisfied by the issuing of the former *habeas*.

The objection to the decree was, that the clerk in Court had not attended with the record at the hearing of the cause against the other Defendant.

Jan. 20.

The LORD CHANCELLOR.

In this case part of the original application was, that Colonel *Needham* might be let in upon terms to answer the bill; but in the reply that was abandoned, for there was no case upon the merits, but quite the contrary. Therefore the question is entirely one of form, whether the proceedings were or were not regular.

Five

(a) 11 G. 4. & 1 W. 4. c. 56.

Five objections to their regularity were taken. The first related to the writ of attachment. By the 4th Order of the 11th of *November* 1841, it is declared that until notice is served of the cause being attached to the Court of some particular Vice-Chancellor, "no party should move, petition, or take any other proceeding." And it is said that in this case no notice of the cause being attached to the Court of the Vice-Chancellor of *England*, was served until the 21st of *January*, whereas the attachment issued on the 19th. That is the irregularity insisted on. But I think it at least very doubtful, whether the term "proceeding" in this order would include an attachment. It is proper to consider what the object of the order was. Two new Vice-Chancellors had been appointed: the causes that were set down before the Lord Chancellor, were to be distributed among the Vice-Chancellors; and it was directed that no petition motion or other proceeding should take place, in any cause, until it had been attached to some particular Court. Under these circumstances, I think the Order must be taken to relate to proceedings in the Court itself, and not to a proceeding like an attachment, which issues under the Great Seal without any application to the Court. In the 5th Order where the same term is also used, it obviously means a proceeding in the Court and no other—a motion, or petition, or a notice of some proceeding in which the Court itself is to be engaged. On this ground alone, therefore, if it were necessary to decide the point, I should be of opinion that this objection was untenable.

1846.
NEEDHAM
v.
NEEDHAM.

But it appears to me to be unnecessary to decide the point, because there is not sufficient evidence of the fact of the attachment having issued before the notice was received. The only evidence relied upon is the date of

1846.

NEEDHAM

v.

NEEDHAM.

that proceeding in the attorney's bill of costs ; but every body knows that, in an attorney's bill, general dates are apt to be put down comprehending a series of acts, and frequently from memory ; and therefore I think no conclusive inference is to be drawn from such an entry as this, that a particular act took place at the precise date set against it. It is true that Colonel *Needham* says he believes it took place at the time mentioned in the bill of costs ; but it is evident that his belief is founded on the bill itself ; and therefore his belief carries the case no further. On the other hand, there is the inference to be drawn from the conduct of his clerk in Court. He was served with notice of the attachment, and it was his duty, which he would no doubt have been careful to perform in a case where the personal liberty of his client was concerned, to have taken steps to set aside the attachment for irregularity, if any existed. No such application was made, and I therefore infer that there was no ground for it. I think, that considering the length of time which has elapsed since these proceedings took place, the inference to be drawn from the conduct of the parties in favour of the Plaintiff is much stronger than any that can be drawn in favour of the Defendant from the date of the item in the bill of costs.

But even supposing the irregularity to have existed, it appears to me that it cannot be taken advantage of after such a lapse of time, at least for the present purpose. Colonel *Needham* says he was not aware of it till he saw the bill of costs ; but his clerk in Court must have been aware of it, which is the same thing. Mr. *Teed* indeed contended, that there could be no waiver of an irregularity in an attachment, because the liberty of the subject was in question ; and in support of that proposition, he referred to several decisions

sions of the Master of the Rolls (a): but these decisions proceeded on quite a different principle, viz. that where a party was in custody, facts which would amount to a waiver under other circumstances, would be no answer to an application for his discharge; but where the party is not in custody, and his object is merely to set aside proceedings founded on the attachment, it would be monstrous to say that there could be no waiver of an irregularity in the attachment for the purpose of sustaining those proceedings. For all these reasons, therefore, I am of opinion that there is no ground for the first objection.

1846.

 NEEDHAM
 v.
 NEEDHAM.

The next objection was, that there was no order to warrant the *habeas* issued to bring up the Defendant for the purpose of taking the bill *pro confesso*. The circumstances were these. On the 21st of *February*, Colonel *Needham* was brought up, and remanded; and on his being remanded, an order was made for a *habeas* to bring him up a second time, that the bill might be taken *pro confesso* against him. He was brought up accordingly on the 13th of *April*: the case came on before the Vice-Chancellor of *England*, who refused the application with costs, and discharged the Defendant from custody. That order, however, was afterwards reversed on appeal, and nothing further was done under it. The Defendant was then brought up again before the Vice-Chancellor, under the original order of the 21st of *February*, but upon a new *habeas*; and the question is, whether that original order was sufficient to warrant the second *habeas*. The order, owing to a mistake of the Court itself, had never been satisfied. The officer who was consulted on the occasion, and to whom all the facts were disclosed, was of opinion that,
 under

(a) *Greening v. Greening*, 1 *Beav.* 121.; *Haynes v. Ball*, 4 *Beav.* 101.

1846.

 NEEDHAM
 v.
 NEEDHAM.

under the circumstances, he was justified in issuing the second writ under the original order. The Vice-Chancellor was also of that opinion, and I entirely concur in it.

The third objection was, that the clerk of records and writs did not appear in Court with the record when the decree was pronounced, and that the decree was on that ground irregular. Several cases were cited in support of that position, but they were all cases of a single Defendant. (a). In such cases the decree is pronounced immediately after the order to take the bill *pro confesso*, and when the clerk is necessarily in Court with the record for the latter purpose, whereas, in cases where there are several Defendants, it is necessary after the bill has been taken *pro confesso* against the Defendant in contempt, that the cause should be set down to be heard as against the others; and the decree then pronounced recites the order to take the bill *pro confesso*. That was the course pursued in the present case. The order was recited in the decree, but the clerk did not again attend with the record; and the question is, whether the decree was on that account irregular. As the question is purely one of practice, I have thought it my duty to refer to the Registrars, who have returned to me a unanimous certificate, that, where a bill against several Defendants has been taken *pro confesso* against one, the clerk of records attending for that purpose with the record, it is not necessary, nor according to the usual course of the Court, that the clerk should attend a second time with the record when the cause is heard as against the other Defendants. Whether that practice be a proper one or not is immaterial, for the application is to set aside the proceedings for irregularity, and if they have been according to the uniform course

(a) *Baker v. Keen*, 4 Sim. 498. *Woolleys v. Baker*, 6 Sim. 316.

course of the Court, there can be no ground for the application.

1846.

NEEDHAM

v.

NEEDHAM.

The next point appears to me to be the most important of all. It arises out of the fifth rule of Sir *Edward Sugden's* Act. By that rule it is required that the party, if not sooner brought up, shall be brought up to the bar of the Court within thirty days from the time of his being in actual custody, and if the last of these thirty days should happen out of term, then within the four first days of the following term. In the present case *Colonel Needham* was not brought up within the thirty days, and the last of these days did occur out of term. And the argument is, that there was no authority to bring him up until the four first days of the following term. But the rule says, "if not sooner brought up," and I think these words apply in construction to the whole clause—to the four first days of the following term, as well as to the thirty days from the time of the party being in actual custody. That construction is most in conformity with the object of the Rule, which was to prevent the party from being kept in custody for an unnecessary length of time; and any other construction would be inconsistent with the thirteenth Rule, which provides that a Defendant in contempt for not answering, shall put in his answer within two calendar months from the time of his being in actual custody, and that in default of his so doing, the Plaintiff shall proceed to take the bill *pro confesso* against him, and obtain an order for that purpose within six weeks after the period, to be computed from the expiration of such two calendar months, within which he may be able to take the same *pro confesso*; and that in default of his so doing, the Defendant shall be entitled to his discharge. Now the period within which he may take the bill *pro confesso* is, by the second rule, twenty-eight days from the

1846.


 NEEDHAM
 v.
 NEEDHAM.

the time of the Defendant being brought up to the bar of the Court, and committed or remanded to the prison of the Court. And it has been decided again and again, that under that Rule a party may be brought up in vacation and remanded in vacation, and that the bill may be taken *pro confesso* against him at any time in vacation (a), and therefore the prisoner is entitled to his discharge unless the order to take the bill *pro confesso* against him be obtained within two months and twenty-eight days, and a further period of six weeks from the time of his being in actual custody, which, if the Defendant's argument be right, it may be impossible for the Plaintiff to do: for, according to that argument, if the Defendant were attached the day after the expiration of *Trinity* term, he could not be regularly brought up to the bar of the Court till the four first days of *Michaelmas* term, at which time he would, under the thirteenth rule, be entitled to his discharge; and thus the Plaintiff might, without any default of his own, and notwithstanding he had conformed strictly to the requisitions of the Rules, be deprived of the opportunity of taking the bill *pro confesso*.

The case of *Simmons v. Wood* (b), which was cited, was exactly like the present. There the Master of the Rolls made the original order for the remand of the Defendant in vacation. After the twenty-eight days had expired, and in vacation, he was again brought up before Vice-Chancellor *Wigram* to have the bill taken *pro confesso* against him, and the Vice-Chancellor made the order. That order was acquiesced in, though an intimation, I believe, was thrown out by the Vice-Chancellor, that an application might be made to this Court to

(a) See *Clark v. Clark*, *supr.* (b) 2 *Hare*, 644.
 p. 116. *Simmons v. Wood*, 2 *Hare*,
 644.

to set it aside. I presume, therefore, the party considered that the proceeding was regular.

1846.

 NEEDHAM
 v.
 NEEDHAM.

The other objection was, that the Defendant was brought up and remanded on a day in vacation, which was not a seal day; but I am clearly of opinion, that there is no ground for that objection. The same thing occurred in *Clark v. Clark (a)*, where, on an application to discharge the Defendant from custody, on the ground of his not having been regularly brought up to the bar of the Court, pursuant to the fifth rule; it appeared that he had been brought up before the Master of the Rolls, and remanded on the 13th of *October*, which was in vacation, and clearly not a seal day. The case was brought here by appeal, and was argued with great activity on other grounds; but no such point as this was raised by the Defendant's counsel.

I have now, I believe, disposed of all the objections that were taken to the proceedings on the score of regularity, and being of opinion that there is no ground for any of them, I must refuse this motion with costs.

(a) *Suprà*, p. 116.

1845.

1845.
July 29.1846.
May 28.

In the Matter of the SUITORS of the High Court of Chancery.

And in the Matter of THOMAS WHITING the Chief Clerk of ANDREW HENRY LYNCH, Esq., one of the Masters of the said Court.

Though the respective duties of the Masters' chief clerk and copying clerk are no where exactly defined, they are sufficiently distinguished in their general features by the provisions of the Chancery Regulation Act relating to those officers, as well as by previous practice. And the Masters are not at liberty to distribute the business of their offices between their two clerks in such a manner as habitually to allot to the

THIS was a petition presented by thirty-two solicitors of the Court, complaining that the duties usually performed by the chief clerks in the Masters' offices, were, in the office of Master *Lynch*, performed by the junior or copying clerk, who had not the qualification required by the act of parliament for the superior office, while Mr. *Whiting* the chief clerk, who received the salary of his office, performed none but the duties usually performed by the junior or copying clerk.

The petition stated, among other things, that, according to the usual course and practice of the Masters' offices, it was the duty of the chief clerk to assist in the prosecution of all enquiries and accounts referred to the Master, in which an exercise of the personal discretion of the Master was not involved, and to prepare the drafts of the Master's reports, and to settle such reports in the presence of the solicitors concerned. So that a very large amount of the business of the Court was, in fact,

copying clerk duties which is to be inferred from that act, were intended to be exclusively performed by the chief clerk, although with proper limitations and on proper occasions the Masters are entitled to require either of their chief clerks to perform any official duty in which his assistance may be required, and for the performance of which he may be competent.

Any solicitor of the Court has a right to complain by petition of an irregularity in the conduct of business in the Masters' offices, and on such irregularity being shewn to exist, the Lord Chancellor may interfere to correct it, though no actual evil be proved to have resulted from it.

fact, transacted by attendances before him as representing the Master; but that the junior or copying clerk was usually a person who had been clerk to the Master while at the bar, and that his proper duties were to wait personally upon the Master, to receive the fees in the office, to make the appointments for attendances, and to enter and copy accounts, reports, and proceedings.

1845.

Case of the
MASTERS'
Clerks.

The petition then submitted that, the distinction between the two offices was clearly marked by the Chancery Regulation act (a), a qualification being thereby required for the chief clerk of five years' standing as an attorney or solicitor, or ten years' service as junior clerk, and his salary being fixed at 1000*l.* a year, payable out of the suitor's fund; while for the writing or copying clerk, no qualification was required, and his salary was only 150*l.* out of the suitor's fund, with the addition of copy money of one penny halfpenny per folio, payable upon all copies, made in the office, by the parties requiring the same, which copy money was to be retained by the writing or copying clerk, and no part thereof was to be received by or applied for the use or benefit of any other person or persons on any pretence whatever. And after stating that from the earliest times the office of chief clerk had been executed by the holder thereof in person, the petition submitted that an office of so much importance as that of chief clerk, ought not to be executed by deputy, which, it was contended, was substantially the effect of the practice complained of; and that to permit the same to be so executed, would be establishing a principle injurious to the interests of the suitors, and contrary to the intent and meaning of the Act of parliament, which was, to secure

(a) 3 & 4 W. 4. c. 94.

1845.
Case of the
MASTERS'
Clerks.

secure to the suitors the performance of the duties of the office by persons possessing the experience and legal attainments indispensable for the efficient discharge thereof.

The petition prayed an enquiry into the matters alleged in it, and an order that, henceforth, the duties of the office of chief clerk might be performed by Mr. *Whiting*, while he should continue such chief clerk, in person, and not by the copying clerk or any other deputy; and that in case Mr. *Whiting* should be found incompetent to the performance of such duties, proper steps might be taken for his removal, and for the appointment of some duly qualified person in his place.

The petition came on to be heard before the Lord Chancellor, assisted by the Master of the Rolls.

Mr. *Romilly* and Mr. *R. Palmer* appeared for the Petitioners.

Mr. *Stuart* and Mr. *Campbell* for the Master.


Mr. *James Parker* and Mr. *Stonor* for Mr. *Whiting*.

It was admitted on all sides, at the bar, that, notwithstanding the practice complained of, the business in Master *Lynch's* office was efficiently and ably conducted.

The various topics which were referred to in the argument, are noticed and discussed in the judgment of the Master of the Rolls.

The MASTER of the ROLLS.

My Lord, In compliance with your Lordship's request, I attend for the purpose of submitting to your Lordship my opinion on this case, to which I have given my best attention.

1846.

 Case of the
 MASTERS'
 Clerks.

1846.
 May 28.

It is represented to your Lordship as Lord High Chancellor, by certain Solicitors, who in that character are officers of the Court of Chancery, to the effect that in the office of Mr. *Lynch*, one of the Masters of the Court, the business of suitors is not conducted in a manner consistent either with the policy and intention of the Chancery Regulation Act 3 & 4 *W. 4. c. 94.*, or with the well-known duties of the two clerks employed by the Master.

The question is of public importance as affecting the administration of justice, and the case is such that I conceive that it ought to be considered on public grounds only. It appears to me, that considerations merely personal ought to be disregarded.

The case is as follows :— In the year 1843, when the late chief clerk of Master *Lynch* died, Mr. *Edward Wright* was his junior or copying clerk, and Mr. *Thomas Whiting* was employed in the office as assistant to *Wright*. *Wright* and *Whiting* were neither of them Solicitors ; and as *Wright* had not been a Master's junior clerk for ten years, he was not qualified to be appointed chief clerk, but it happened that *Whiting*, who was then employed only as an assistant to *Wright*, had formerly been for more than ten years junior clerk to Mr. *Cross* ; by that means he was qualified to be appointed chief clerk, and he was appointed to that office by Mr. *Lynch*.

1846.
Case of the
MASTERS'
Clerks.

In the year 1845, Mr. *John Coverdale* and other solicitors presented their petition to your Lordship stating, that *Whiting*, notwithstanding his appointment to be chief clerk, did not perform the important duties belonging to that office, but that the same were performed by *Wright*, the junior or copying clerk, who was not qualified by law to be chief clerk; and praying your Lordship to make such order as the nature of the case might require.


The principal complaint is, that some at least of the important duties of the chief clerk are habitually, and in the ordinary course of business, performed by a person who is not by law qualified to be appointed chief clerk.

The answer made to the complaint is, that there are not in fact any peculiar duties which can be exclusively called the duties of the chief clerk, for that the Master is entitled to distribute the business of his office between his clerks in such manner as he may think proper, and most conducive to the efficient transaction of the business before him. The question to be determined is, whether the proposition thus broadly stated is correct.


By the statute 3 & 4 *W. 4. c. 94. s. 18.*, no person is to be appointed chief clerk unless he has been admitted a solicitor for not less than five years, or has been a junior clerk in some Master's office for ten years: but the Act does not assign particular duties to either clerk, or forbid the Master in terms from employing his clerks in the transaction of any part of the business of his office in any way he may think best.

Considering the peculiar and important nature of the business transacted in the Master's office, the responsibility

sibility of the Master for the due transaction of the whole, and the urgent necessity for avoiding all avoidable interruptions in the course of judicial enquiries, it appears to me, that if due vigilance be exercised on the part of the Master, little danger arises, or would ever arise, from a prudent exercise of discretion in the matter; and that it would be very inconvenient if the Master could not, under any circumstances whatever, require one clerk (being competent) to assist in the business which peculiarly belonged to, or was ordinarily transacted by the other. In the cases of sickness or accident, of great pressure of one sort of business, or of any emergency of such a nature as to require and justify a deviation from ordinary rules, I apprehend that it is in the power of the Master (personally exercising due vigilance in the transaction of the business) to employ either clerk in the manner in which he may, on due consideration, think the emergency requires.

1846.

 Case of the
 MASTERS'
 Clerks.

If this were the sort of distribution of business to which the argument against the petition referred, I should with some qualification be disposed to accede to it; but an authority to direct the clerks to assist occasionally in the performance of the duties of each other, upon the occurrence of emergencies requiring such assistance, does not appear to me to afford any support to the proposition, that neither clerk has any peculiar duties; or extend to confer, or by any means imply, an authority to change the nature of the places or offices of the two clerks, or to transfer permanently or habitually the most important duties of the one to the other; and I am of opinion that, consistently with the Act of parliament, the Master has no such authority.


1846.

 Case of the
 MASTERS'
 Clerks.

The Act recognizes two clerks, and it is plain from the language used, and the enactments made respecting them, that they were considered to hold two different offices. One is called the chief clerk ; the other is called the copying, writing, or junior clerk. For the chief clerk a specific legal qualification is required, and by that means the Master's appointment is subject to a specific legal check. For the other, (the copying, writing, or junior clerk,) no specific qualification is required. The Master's appointment is left to his own discretion and judgment, subject of course to responsibility for its due exercise, but without any pre-appointed fetter. Again, there is given to the chief clerk for his remuneration, a salary of 1000*l.* a year, and he is forbidden to receive any fee for gratuity. There is given to the copying, writing, or junior clerk for his remuneration, a salary of 150*l.* a year, and copy money at the rate of 1½*d.* per folio. The amount of copy money is uncertain : it depends on the length of the documents and papers, of which copies are (I am afraid to say *required*, but) allowed.

The reasons for these remarkable differences in the names, in the qualifications, and in the mode of remunerating the two officers, are not stated in the Act, but they must be presumed to be founded on the differences between the duties usually performed, or supposed to be usually performed by the officers respectively.

It could not have been intended to fetter the Master in his choice of a chief clerk by a qualification, and then permit him to allot the performance of the duties, in respect of which the qualification must have been required, to a person not qualified. Neither could it have been intended that the Master should allot to the junior clerks having an interest in copy money, the performance

performance of the same duties which had previously been performed by the chief clerks, from whom all interest in fees and copy money was carefully taken away. And I am of opinion, that upon the construction of the Act taken by itself, the Master is not entitled so to distribute the business of his office between his clerks, as habitually to allot to the one who is not legally qualified, and who is interested in copy money, those duties in respect of which the legislature has thought fit to require that the clerk who is to perform them shall have a qualification, and shall not have an interest in copy money, but shall by the absence of that interest, be protected against the temptation to increase the length of copies.

1846.

 Case of the
 MASTERS'
 Clerks.

But then the question arises, what the duties are? The legislature has not defined or mentioned them, and it is thereupon contended, that the Master has himself an authority to determine them, or to state what they shall be. This is in truth the same thing as saying that the Master may by his directions defeat the purpose of the legislature, and give to the unqualified and unprotected clerk the duties which were intended to be performed by the qualified and protected clerk. The allegation in support of such unlimited power in the Master appears to me to be wholly untenable.


Notwithstanding some variations in the duties of the clerks respectively, and some alterations made in them from time to time, and notwithstanding the authority which I conceive the Masters have to exercise some considerable discretion on the subject, there is no man of learning and experience in the business of this Court, who does not well and familiarly know the broad distinction between the general duties of the chief clerks and those of the copying, writing, or junior clerks.

1846.
Case of the
MASTERS'
Clerks.

An attempt to define them accurately might fail ; and if it succeeded, might very probably interfere injuriously with the authority which the Master ought to have over both clerks, and might by that means embarrass the transaction of the business in the offices. And the circumstances of the case do not appear to me to require that any such attempt should be made ; but the argument which has been used makes some investigation necessary.


I collect from the enquiries which I have made, that at an early period of the history of the Court, the Masters were licensed or authorised by the Lord Chancellor to employ a limited number of clerks, and that such clerks were, to some extent at least, considered to be officers of the Court, in the special employment and under the direction of the Masters, subject to such regulations as the Lord Chancellor might direct. In the course of the great alterations which in the progress of time were made in the duties of the Masters, the situation and duties of the clerks were much changed, and it rather seems that the clerks became less considered to be officers of the Court, or less distinctly treated as such than they once were. In the mean time the Masters themselves seem to have been entitled to all the fees legally payable in their offices ; and till about the year 1621, they received, in addition to their fees, benevolences or gratuities for services, or for the performance of duties in respect to which they were entitled to no fee and received no salary ; but this practice being stopped, and additional fees being afterwards allowed, a notion was entertained that fees and duties were so closely connected, that there could be no duty of the Masters to which a corresponding fee was not annexed ; and within my own memory a case occurred in which Master *Stratford* declined to sign a certain certificate, which

which was wanted for the purpose of a reference made to him, on the sole ground that it was no part of his duty to sign it, because no fee was payable thereon. I cannot say that I think this doctrine was ever sustainable. But the fees formerly payable to the officers do nevertheless afford some indication of the duties they had to perform. And I find that in a return (made to an order of the House of Commons, dated the 14th day of *November* 1693), of the fees due and paid to the Masters of the Court of Chancery and their clerks, there are the following, viz. : — “ The clerk’s fee for writing every report or certificate, 5s. ;” and “ the clerk’s fee for writing the recognizance and condition as the order directs, 2s. 6d.” The duties here indicated, consisted only in writing. I further find that the commissioners who reported in 1740, stated the clerk’s fees to be as follows : — “ For drawing and transcribing every report or certificate, 5s. For drawing and engrossing every recognizance with the condition, 5s. For writing each bidding for estates before a Master, 2s. 6d. For writing the jurats of affidavits taken in matters not depending in Court, as also the caption of every deed or recognizance, 6d. For attending the Court with deeds and writings, each day, 6s. 8d.” — Here the duties indicated are, drawing, transcribing, engrossing, writing, and attending the Court.

1846.

 Case of the
 MASTERS’
 Clerks.

But it appears that the duties thus indicated, were not the only duties performed by the clerks; they assisted the Masters in other respects, and as a remuneration for that assistance, they received some part of those fees to which the Masters themselves were entitled.

In the report of 1740, to which I have already referred, the Commissioners say that each Master “ has
 X x 4 usually

1846.

 Case of the
 MASTERS'
 Clerks.


usually two clerks, one of which ought to be a person of good ability and knowledge in the practice of the Court; and such clerks hold their places at the will of their respective Masters." They afterwards set forth a list of fees distinguished as "lawful fees," "reasonable fees," and "clerk's fees," and state the presentment of the jury before whom the enquiry was conducted, that some of the clerks claimed as "clerk's fees," several of the fees before mentioned as "lawful fees," and that the jury found that the clerks served their several Masters upon such terms as they mutually thought fit to agree upon between themselves; and that some of the fees styled the "clerk's fees," were wholly taken by some of the clerks to their own use; and that others of them received some proportion of the fees styled "lawful fees" to their own use, according to the several agreements between the Masters and their clerks respectively; but what such agreements were, the jury were not informed.

This report necessarily came under the consideration of Lord *Hardwicke*, whose Order of *November 1743 (a)*, was founded upon it. He authorised the Masters to receive the fees styled "lawful fees," and the clerks to receive the fees styled "clerk's fees;" and it is to be observed that copy money was among the "lawful fees," and not among the "clerk's fees."

It does not appear that the agreements subsisting between the Masters and their clerks were in any way disturbed. But such agreements having relation to the remuneration of the clerks, must also have had relation to the services rendered by the clerks, or the duties performed by them, *i. e.* to the services or duties of the
 Masters

(a) *Beames's Orders*, p. 369.

Masters in respect of which the Masters were by law entitled to require the assistance of their clerks.

1846.

 Case of the
 MASTERS'
 Clerks.

Now the Masters' duties, though primarily ministerial, are from their nature very often so closely connected with judicial duties, that it is not possible in many cases to distinguish what is judicial from that which is ministerial, and whatever may be the assistance which the Master is entitled to obtain from his clerk, it will perhaps unavoidably happen that some part of it is of a judicial character; and notwithstanding the authority which there is for the expression, I do not think that the Master is, or ever was in the ordinary sense of the word "delegation," entitled to "delegate" any part of his duty to the clerk. The practice of the office appears to me to shew that he has a right to obtain the assistance of his clerk, possessing good ability and knowledge in the practice of the Court, in matters which being primarily ministerial, may nevertheless incidentally involve judicial considerations.

But as any arrangements or agreements for such assistance must be of great delicacy and importance, and must always be subject to abuse, I am of opinion that they must at all times have been subject to the superintendence and controul, and, if necessary, to the correction of the Lord Chancellor. All courts, it has been said, must have a discretionary power over their officers to prevent abuse and injury to the suitors, and consequent disgrace to the Court itself; and I apprehend that the Masters were never authorised to regulate the business of their offices, either by dividing it between their clerks or in any way whatever, otherwise than subject to the control and direction of the Court. But the business was the Master's business, and he was and still is responsible for its due performance, and subject to the control

1846.


Case of the
MASTERS'
Clerks.

control of the Court if required, he was, and I think still is, at liberty to employ his clerks within proper limits at his own discretion. But it is not to be presumed that he was at liberty so to distribute the business of his office, as unnecessarily or habitually to give that part of the business which required the most skill to the clerk who possessed least. I assume that the Masters were disposed to act, and did usually act, and do now act in a correct and rational manner, and give to the chief clerk or the person of good ability and knowledge in the practice of the Court, that part of the business which requires that sort of qualification.

It may be observed, that although the Report of 1740 speaks of each Master having usually had two clerks, a very old ordinance directs that each Master in ordinary shall have only one clerk, and it seems very probable that the second clerk was admitted only for the purpose of relieving the first clerk from the performance of duties purely mechanical, probably in the same way that *Whiting*, before his elevation to the office of chief clerk, was permitted to assist *Wright* the junior clerk. It is understood that the clerk's fees mentioned in the report, and in Lord *Hardwicke's* Order, were the chief clerk's fees.

In *February* 1815, a commission issued to certain persons to make a diligent examination of the duties, salaries, and emoluments of the several officers, clerks, and ministers of justice, of and within the Court of Chancery and other courts, and on the 19th of *April* 1816, the Commissioners in their report stated as follows:—“There are attached to each office (of the Masters) two clerks; one is the chief clerk, and who, as stated in the Report of 1740, ought to be a person of good ability and knowledge in the practice of the Court; the

the other is the copying clerk. We have called for returns from the principal clerks only, because they appear to us to be officers, clerks, and ministers of justice within the meaning of the commission. They receive fees given to them directly by the order of 1743, and have the general superintendence of the business under the Master. But the copying clerks have no emolument whatever, except what they derive from a salary allowed by the Master, or a proportion of the fees belonging to him or to the principal clerk, and seem to have no other duty than what their description imports; that of making copies for the use of the suitors. “The duties of the principal clerks are —

1846.

 Case of the
 MASTERS'
 Clerks.

1. “To keep a register of the warrants or summonses issued from the office.

2. “And of the names of the clerks in Court and solicitors who attend the return thereof, by which register the costs are afterwards taxed.

3. “To arrange and preserve the records, deeds, books, and other documents in the office, so that they may at all times be readily found and produced when wanted.

4. “To attend the Court with deeds, books, and papers, *Cha. Rep. A. 133*.

5. “To draw, and

6. “Transcribe all certificates to be signed by the Master.

7. “To draw, and

8. “Transcribe all reports to be afterwards settled and signed by the Master.

9. “To prepare the schedule to be annexed to the reports.

10. “To make calculations.

“Generally to assist the Master in the execution of the various duties of his office as he shall direct.

“Two

1846.


Case of the
MASTERS'
Clerks.

“ The duty of drawing the certificates and reports, requires that the principal clerk should be not only familiar with the usual course of business, so as to prepare the certificates and reports, for which there are established forms, but he must know enough of the general law and practice of the Court of Chancery to understand the orders and decrees pronounced by it, differing in almost every case; he must make himself particularly acquainted with such of those orders and decrees as are referred to his office, with the proceedings before the Master, and with his decisions upon the points before him; and he ought to be enabled to arrange the whole in the form of a report, in order to be ultimately settled by the Master; and for calculations he ought to be a ready accountant. The principal clerks should be persons of some education, and of great experience and skill in business.”

A paper dated 10th of *January* 1820, and entitled “ Duties of book-keeper and cashier, who also shall do the business of a copying clerk with such assistants in or out of the office as he chooses to employ,” was produced in the course of the argument. It purports to be a statement of regulations adopted or proposed to be adopted by Master *Stephen*, for adding to the former duties of the copying clerk the duties of book-keeper and cashier; an arrangement which Mr. *Stephen* was desirous to effect.

It does not appear that in the course of the inquiries which took place under the commission of *April* 1824, any question arose as to the duties of chief clerks and junior clerks respectively; but it is plain that a great distinction was considered to subsist between them.

Two of the chief clerks, and ten junior clerks, were examined as witnesses. Mr. *Lammin*, the chief clerk of Mr. *Stephen*, stated that he was occupied with states of facts and documents left with the Master. He examined the evidence and the deeds which were stated; which enabled the Master to decide on the statements before him. So, in passing accounts; where there was no difficulty, they were passed before him (the clerk), comparing the vouchers with the items and documents and verifying the accounts, and making queries on any doubtful items for the Master's attention. The costs in the office were taxed by the Master, or by him, with the assistance generally of a clerk in Court. It was part of his business to draw reports, except some very special reports which the Master drew himself; part of his time was employed in calculations which he had to do of course, and part in advising with the solicitor. He said that the junior clerk attended generally in the evening to receive papers and deliver out copies; and that the junior clerk attended Court with deeds as his representative; he should not have time to attend Court himself.

1846.

 Case of the
 MASTERS'
 Clerks.

From the examination of the junior clerks, it would appear, that the peculiar business of junior clerk was considered to be to grant warrants, and to make or procure to be made, copies of papers. Eight of them were asked by whom calculations were made. Six answered, "by the chief clerks."

There can be no doubt, that more information would have been obtained, if any question had arisen. I collect from the course of examination, that the Commissioners considered the duties of the chief clerks to be stated with sufficient correctness in the Report of 1816.

The

1848.

Case of the
MASTERS'
Clerks.

The Report of *February* 1826, p. 23, 24., and the propositions of the Commissioners No. 110 to 117, do not appear to me to throw any light on the subject.


In *March* 1827, such propositions or modified propositions of the Commissioners as it was then thought proper to give effect to, were made the subject of a bill brought into the House of Commons by your Lordship, then Master of the Rolls; and on that bill the Masters made certain observations, in the course of which they suggested, that the chief clerks ought to be made receivers of the fees there referred to, and that the returns should be made up by them; and they observe, that the copy money, including the share of profit by it allowed to the clerks, formed, probably, on an average, above three-fourths of the whole of their official receipts, and that the remainder would hardly suffice to pay, adequately, the senior or junior clerks; and that the incomes of the latter almost exclusively arose from their share of this emolument. In discussing the question relating to any interest in copy money which might be reserved to the chief clerk, he is mentioned as “necessarily the Master’s coadjutor in many of his important functions;” and as to the junior clerks, the Masters proceed:—
“There seems to be no objection to the junior or copying clerks still receiving a profit upon copies made by them, for they have no functions to discharge, but such as are strictly of a ministerial kind, and have no power of augmenting, in any way, the amount of such profit, unless by over-counting the folios, which may be easily prevented by simplifying, in that respect, the very complex mode of computation. As the junior clerks have the immediate charge of all the papers in the office, with the duty not only of preserving, but of arranging, them for use when wanted, as well as making copies or extracts, whether for delivery to solicitors or for use
within

within the office, their labours are, in a great measure, proportionate to the bulk and number of the papers brought in and left; in other words, to the ordinary subjects of copy money. They are a very industrious and valuable set of men; and the trust necessarily reposed in them, considering the importance of the deeds and other documents under their charge, is very great; while, unfortunately, they have not the same security in their talents and good conduct for the stability of their situations that the chief clerks have, it being most usual for new Masters to appoint in their stead their own professional clerks."

1846.

Case of the
MASTERS'
Clerks.

In the course of the discussion which preceded the Orders of *April* 1828, Master *Stephen*, who had never permitted gratuities to be received in his office, and who was most earnest to have them generally discontinued, made several observations on the subject, and took occasion, amongst other things, to say,—"That the chief clerk had very important and highly delicate functions to discharge, and had to exercise his judgment in almost every cause, on matters deeply interesting to the solicitor himself, and, in most causes, to his client. That if the chief clerk were not unbiassed and faithful, the integrity of the Master himself, though seconded by his utmost vigilance, was no security to the Court or the public against gross injustice. That if the task of comparing charges and discharges, bills of costs, &c., with the examinations and vouchers, were not committed to the chief clerk, twenty Masters could not despatch the business then discharged by the ten." "In short," he adds, "it may truly be said, that the duties which the Masters are obliged to delegate to their chief clerks, are not less fiduciary and important than those which they discharge in person. Some apologies usually made for the practice [of giving gratuities to the chief clerk]

1846.

 Case of the
 Masters'
 Clerks.

clerk] rest upon false or inadequate views of the chief clerk's official functions. These are spoken of as if they were wholly ministerial, and, consequently, the more or less despatch is treated as the only point in which the gratuity or its comparative amount can corruptly influence his judgment. But it has been shewn, that his functions, as assistant to the Master, are also of a judicial kind, and when that is stated, there is an end of every sound or plausible defence. The chief clerk, on many or most ordinary occasions, performs the Master's duty in his stead."


In the course of the same observations, Mr. Stephen mentioned the loss which his own clerk, Mr. Lammie, had sustained, by the abolition of gratuities, and in noticing the disparity of his emoluments, includes therein, the allowance of 100*l.* out of them to the junior clerk, to whom his duties, as official accountant, had been transferred. And he further expresses himself thus: — "As to the junior clerks, they ought clearly to retain, as now, a proper share of the copy money they receive; for as they pay the assistant writing clerks and stationers, their labour and disbursements must always be proportioned to the number and length of the copies they actually make. Their province, in the care and arrangement of papers, warrants, &c., is one of much labour and importance, and will be still more so if they are made also book-keepers and accountants. They ought not to be inadequately paid."

The statement of duties contained in the Report of 1816 is not complete, either as to the duties of chief clerk, or as to the duties of copying clerk; and I have not thought it necessary to enquire, whether it is perfectly accurate as far as it goes. If it was, alterations of some importance were afterwards made; but from all that

you have seen

I have

I have stated, it is plain, that the business of the chief clerk was to assist the Master in the performance of his most important duties, those duties which partake most of a judicial character; and that the business of the junior clerk was invariably considered to be of an inferior and more exclusively ministerial character, requiring attention, diligence, and fidelity, but not all the qualifications of knowledge, experience, and skill which ought to be found in the chief clerk.

1846.

 Case of the
 MASTERS'
 Clerks.

It appears by the evidence adduced on the present occasion, and otherwise, that some duties which in the Report of 1816, are considered to be duties of the chief, are now performed by the junior clerks in most of the Master's offices — such as the registering of warrants and of the names of solicitors attending the return thereof; the arrangement and care of the documents in the office; the attendance in Court with deeds, books, and papers, and the transcription of certificates and reports.

These duties seem to be all of them merely ministerial, and I think that the Master ought to have considerable discretion on the subject. They are matters which perhaps cannot, consistently with the interest of the suitors, be subjected to strict and rigid rules; and in a case which does not appear to me to make it necessary, I do not think that it would be useful to enquire into, or in any way abridge, the Master's authority respecting them.

But, admitting all these and some other alterations to have been rightly made, the distinction between the chief clerks and the junior clerks is still sufficiently broad.

1846.


Case of the
MASTERS'
Clerks.

Notwithstanding the present contest, and the arguments which have been used, I do not suppose that the Masters have ever considered their two clerks as standing on an equality as their servants, agents, or assistants. The senior clerks, with reference to the duties to be performed by them, have at all times been well known and understood to have required other and higher qualifications than the junior clerks. And I am of opinion that the Masters never were entitled to confound the offices of the two clerks, allot to one the duties which ought to be performed by the other, or direct their respective duties to be interchangeably performed without restriction or limitation, though I think, with proper limitation, and on proper occasions, the Master has always been entitled to require either clerk to perform any official duty in which his assistance was wanted, and for the performance of which he was competent.

Such, I conceive, to have been the state of the case before the passing of the Chancery Regulation Act; and I now proceed to notice some of the circumstances under which that act was passed.

In *August* 1832, a bill was laid upon the table of the House of Lords, by which, amongst other things, it was proposed to be enacted, that no person should be appointed to be chief clerk to any Master in Ordinary, unless he should have been admitted on the roll of solicitors, and practised as a solicitor in that Court for not less than five years, or should have been a junior clerk in the office of one of the said Masters for a like term of five years; and that the chief clerk of the Master should not be removed from his office unless for sufficient cause, to be approved by the Lord Chancellor. That the Masters and the clerks respectively should be paid partly by salaries and partly by fees; the senior clerk's fees

fees to be such as were intended to be specified in a schedule to the act. And the junior clerks were to be entitled to receive for all copies made in the offices to which they belonged one penny per folio, and gratuities were proposed to be put an end to.

1846.

 Case of the
 MASTERS'
 Clerks.

The bill which was introduced into the House of Lords in the following year, *i. e.* in *April* 1833, required the same qualification for the Master's chief clerk, but omitted the special provision contained in the former bill for the non removal of the chief clerk unless for sufficient cause, to be approved by the Lord Chancellor. It contained a clause providing generally that every officer and clerk, except clerks employed as writing or copying clerks, should hold his office during his good behaviour, to be removable, however, by the Lord Chancellor upon complaint made to him, and proof of misconduct or neglect. The Masters themselves were excepted from this power of removal.

It was, I believe, in the progress of the bill through the House of Lords that the qualification clause was so altered as to require that the chief clerk should have been a solicitor for five years, or a junior clerk for ten years, and that the power proposed to be given to the Lord Chancellor, to remove officers and clerks for neglect or misconduct, was omitted.

On the 31st of *May* 1833, the House of Commons ordered several accounts relating to the Masters' offices to be returned, and, amongst others, an account of the sums of money received for copies, and how much of such sums were received by and applied to the benefit of each Master, and how much for their respective clerks. The returns were ordered to be printed on the 26th day of *July* 1833, and it appeared from them, that

1846.

Case of the
MASTERS
Clerks.

in the office of six of the Masters the two clerks had equal portions of copy money allotted to them. But that in the offices of two of the Masters the second clerk had more than the first. It does not appear what sums were allotted to the clerks respectively in the two other offices.

On the 29th of *July* 1838, a select Committee of the House of Commons was appointed to consider the Chancery offices with reference to the bill, and before that Committee certain witnesses were examined.

Mr. *Vizard* stated that the object of the qualification clause was to prevent the Master appointing inefficient persons.

Mr. *Jones* (chief clerk of Master *Cross*) stated that all the chief clerks except three had been solicitors, and he said, "The duties of the chief clerk are so various, that it is hardly possible to state them exactly, but I will endeavour to do it. The chief clerk assists the Master in all the details of the business of his office; for instance, if it is referred to the Master to take the accounts of trustees or executors, the Master's clerk examines the accounts with all the vouchers, and if there are any questions of law or equity arising, which will frequently occur in taking the accounts of executors and trustees, they are reserved for the special opinion of the Master upon the subject; and when the accounts are gone through, they form part of the detailed reference to the Master. There are many other things in which the clerk gives his assistance. When all the proceedings of the reference are gone through, it is the duty of the clerk to read through all the papers and understand the case and draw the report. In some business the clerk goes through the business first, re-

serving

serving difficult points for the further consideration of the Master; there are other cases where it goes before the Master in the first instance, the Master assuming that the statements before him are all correct, but leaving it to his clerk to examine them afterwards with the papers to be produced, and in the case of statements from deeds, the clerk ought to be a little conversant with the nature and effect of deeds, and the principles of law and equity, to see that the deeds are correctly stated to meet the case."

1846.

Case of the
MASTERS'
Clerks.

The junior clerk is employed in making copies of proceedings and delivering them to the solicitors, and in issuing the summonses and warrants through the medium of which the solicitors attend; and the greater portion of his time is employed in issuing those warrants, and if he was only to be paid for the copies he makes he would not gain a livelihood, and most of the copies done by himself must be done at night; and he is obliged to employ persons out of the office to assist him, and get the copying business done as well as he can."

Mr. Farrer being asked, whether there was a great proportion of the business done by the chief clerk, without the intervention of the Master himself, except for the purpose of affixing his signature, or doing something to give authenticity to the instrument, answered—
"The chief business of that kind is in passing receiver's accounts and going through discharges; a great part of them are merely ministerial, merely checking the items with the receipts, and, unless a difficulty arises, the chief clerk goes through them. If there is any question of allowance, the chief clerk always refers it to the Master; he never determines questions of property to any amount without referring it to the Master. The ge-


1846.

Case of the
MASTERS'
Clerks.

neral practice is for the clerk to draw the report; sometimes the Master draws the report where it is of a special nature, when he thinks he can draw it from what passed before him with greater facility. I consider the Master as a Judge, and the clerk as a ministerial officer. In conversation the Masters have turned their attention to what would be the proper salary for our principal clerks if it was thought proper to give them a salary. I do not think we have had any conversation as to the amount of salary to be provided for the second clerks; we saw the fees proposed for them; they would not produce an adequate salary for them as I am informed. They are called copying clerks, but they make little or nothing by copies made by themselves; they have, I believe, little or nothing for making copies." Q. "Do they do business for the chief clerk sometimes?" "No, I believe not; I think they are not competent to it; but they have a variety of duties to discharge that require great attention, and are of great importance to the regularity of the proceedings." Q. "The chief clerks have either been solicitors, or managing clerks to solicitors." "Yes, generally. My own chief clerk was advanced from the situation of second to chief clerk. My former answer should be qualified, for he certainly for some time did great part of the business for the chief clerk. I speak of the time of my predecessor: I found him in the situation of chief clerk."

Mr. *Lammin*, who had been fourteen years in a solicitor's office, and a managing clerk, before he became chief clerk to Mr. *Stephen*, and was then chief clerk to Mr. *Brougham*, being asked whether he had at all considered what would be a fair remuneration for the second clerk, answered, "I have never had that called to my attention; we could not do without them;

them; they are mere writers, and acquainted with the business of keeping the accounts and giving out the warrants, and entering the money received;” and being asked whether the situation of junior clerk could be adequately worked by a good methodical man of business, without any previous knowledge in the profession, he answered, “Yes, a boy from *Christ’s Hospital* could soon do it.” And Mr. *Elderton*, then also a chief clerk, who was present, said that he quite agreed in that.

1846.

 Case of the
 Masters’
 Clerks.

Upon, or at least after, this evidence, and when the facts stated by the witnesses must have been well known, the Regulation Act passed the Committee of the House of Commons, and afterwards the two houses of parliament, with the qualification clause; but the clause enabling officers and clerks to hold their offices during their good behaviour was so altered in its progress through the Commons as to exclude the Masters’ clerks from its operation; and this exclusion was one of the grounds on which it was decided in the case of *Ex parte Ward (a)*, that the office of junior clerk was held during the pleasure of the Master.

But every thing which appears on the subject tends to shew that the offices of chief and junior clerks were considered to be two distinct offices of very different and unequal character, to which distinct duties, requiring very different qualifications, were attributed, and the result of the antecedent history is in perfect conformity with that which appears to me to be the true construction of the Act itself.

It appears, I think, very plainly that, in the performance of the duties which were understood to belong to the chief clerk, they were thought to have it in their power

(a) Not reported.

Y y 4

1846,
 Case of the
 Masters,
 Clerks.

power to manage the business of the office in such a way as to increase fees unnecessarily, and that so long as they had an interest in fees, they were exposed to the temptation of putting the suitors to unnecessary expense for their own profit. All interest in fees was therefore taken from them, and such a remuneration as was thought sufficient was given to them. I think it cannot be doubted, that the object was not only to secure a better class of persons, but also to exempt or protect them from the temptation to which an interest in fees of any kind was supposed to expose them.

On the other hand, the junior clerks were not supposed to be exposed to the like temptations; at all events, they were not supposed to be in a situation which enabled them to manage the business of the office, so as to make unnecessary occasions for receiving fees; it was apprehended, I am afraid erroneously, that extortion by miscounting folios might easily be prevented, and the number of copies was supposed to bear some proportion to the actual labour which the junior clerks had to perform. Under these circumstances, the junior clerks were to be in part paid by copy money, the rate of 1d. per folio was first proposed: it was afterwards increased to the rate of 1½d. per folio; and the deficiency of remuneration, which it was (as it now appears) most erroneously supposed that rate would produce, was probably a reason for adding a salary of 150*l.* a year.

The chief clerks being excluded from fees for the purpose of avoiding the temptation to increase them, to which they might be exposed in the ordinary discharge of their known duties, it would, as it appears to me, be absurd, and contrary to the plain policy of the act, to allot the performance of those duties to the junior clerks, who are permitted to receive copy money as fees; it would

would be wilfully and knowingly exposing the junior clerk to the temptation from which the legislature intended to exempt the senior clerk; and doing that by interchanging the duties in the performance of which the temptation was supposed to arise: and it would be at the same time committing to an unqualified person the performance of those duties which it is perfectly plain the legislature intended to be performed by a qualified person.

1846.
Case of the
Masters
Clerks.

From the evidence which has been adduced, it appears that Mr. *Lynch* commits to his junior clerk some of those duties which, at the time when the act passed, were considered to be the peculiar duties of the chief clerks. There is no evidence that the business is in any way neglected or ill-conducted, or that any temptation to which the junior clerk may, by the nature of the duties committed to him, have been exposed, to increase copy money, has in practice had that effect. There is no complaint on the subject which has even been adverted to in the argument. The strict attention to the duties of his own office, for which Mr. *Lynch* has been so justly and so honourably distinguished, and for which I am myself glad to be able to bear willing testimony, and on the virtue of Mr. *Wright*, may have saved the office from the commission of any wrong of the kind; but, in the very nature of the duties committed to Mr. *Wright*, there is the matter of temptation which the legislature intended to remove. The mischief might arise almost insensibly, and might escape the vigilant attention which Mr. *Lynch* might apply to it; and if the mischief were to arise, and were to exist even to a considerable extent, no evidence of it might be produced; for, unfortunately, it is not the interest of any one practising the law to complain of the length of documents. A long document is a profit not only to the clerk who makes

hijooz

or

1846.

Case of the
MASTERS'
Clerks.

or procures the copies and the stationer who writes or copies them, but to every one who receives remuneration for the use of them. I am afraid, that in such a case, the absence of complaint does not prove that there is no ground of complaint. But assuming, as perhaps I ought to do, that the mischief does not exist, still it is not guarded against in the manner which has been provided by the legislature; the law is not obeyed, and the suitors are exposed to a risk which obedience to the law would remove. And under all these circumstances, I am of opinion, that the business in the office of Mr. *Lynch* is not distributed in a manner consistent with the evident intention of the Act of parliament.


If this should be the opinion of your lordship, I may presume that Mr. *Lynch* will not require any direction as to what ought to be done, or any other inducement for his adoption of the necessary proceedings to place the business of his office on a proper footing.

The LORD CHANCELLOR.

I have requested the assistance of the Master of the Rolls in the hearing of this petition, on the ground that he is the head of the department of the Court to which the question refers, and I need hardly state that I entirely concur with him in the full and elaborate opinion which he has delivered.

The question of the duties, or rather of the offices, of the first and second clerks was considered in a general way in the Report of the Commission of 1740. A distinction was then drawn between the two offices. "The chief clerk," it is there stated, "should be a person of good ability and well versed in the practice of the Court." The same subject came under the consideration of the Commission

I have stated, it is plain, that the business of the chief clerk was to assist the Master in the performance of his most important duties, those duties which partake most of a judicial character; and that the business of the junior clerk was invariably considered to be of an inferior and more exclusively ministerial character, requiring attention, diligence, and fidelity, but not all the qualifications of knowledge, experience, and skill which ought to be found in the chief clerk.

1846.

 Case of the
 MASTERS'
 Clerks.

It appears by the evidence adduced on the present occasion, and otherwise, that some duties which in the Report of 1816, are considered to be duties of the chief, are now performed by the junior clerks in most of the Master's offices — such as the registering of warrants and of the names of solicitors attending the return thereof; the arrangement and care of the documents in the office; the attendance in Court with deeds, books, and papers, and the transcription of certificates and reports.

These duties seem to be all of them merely ministerial, and I think that the Master ought to have considerable discretion on the subject. They are matters which perhaps cannot, consistently with the interest of the suitors, be subjected to strict and rigid rules; and in a case which does not appear to me to make it necessary, I do not think that it would be useful to enquire into, or in any way abridge, the Master's authority respecting them.

But, admitting all these and some other alterations to have been rightly made, the distinction between the chief clerks and the junior clerks is still sufficiently broad.

1846.
Case of the
MASTERS'
Clerks.

them. The legislature has thought it right, for the purpose of securing, as far as it can be secured by legislative enactment, an efficient discharge of the duties of the office, to prescribe a particular test; and that test must be adhered to. I do not mean to say that no part of the ministerial duties of the superior clerk may, under any circumstances, by the direction of the Master, be performed by the junior clerk. That would be to draw the rule too tight. But the spirit of the Act must not be evaded. It is because I think that in this case there has been a departure from the spirit of the Act, that I think I am bound to come to the conclusion, that, in this respect, the Master has acted with irregularity.

Mr. Bickel and Mr. Corlies concur.

I agree with the Master of the Rolls, in thinking that it is not necessary at present for the Court to make any order on the subject. An intimation of our opinion will, I am sure, be sufficient. It is my duty, also, in concurrence with the Master of the Rolls, to say that, from all I have observed with respect to Master Lynch, no individual could perform the duties of that office with more assiduity, intelligence, or ability, than he does. I shall intimate to Master Lynch the opinion of the Court, and I have no doubt that he will immediately conform to it.

A statement in an answer that certain documents admitted to be in the Defendant's possession form part of the evidence of his title, and do not form part of the title of the Plaintiff to the premises in question, is not sufficient to prevent the rectification of the original document, if it appears that they be in their nature such as may be used in support of the Plaintiff's case, and the answer does not distinctly deny that they do.

Defendant who has answered cannot resist a motion for production of documents referred to in his answer.

on the ground that the bill is open to a general demurrer for want of specificity.

1846.

The Marquis of BUTE v. The GLAMORGANSHIRE CANAL COMPANY.

THIS was a renewal, before the Lord Chancellor, of a motion which had been refused by the Vice-Chancellor of England, for the production of the documents mentioned in the schedule to the answer.

Mr. Stuart and Mr. James, for the motion.

Mr. Bethell and Mr. Colvile, contra.

The material parts of the pleadings, and the points taken in the argument, are fully stated in the judgment.

The Lord Chancellor.


The bill states that a narrow strip of land, containing seventeen acres more or less, part of a larger piece, was purchased by the Defendants under the authority of an Act of parliament in the year 1803, from the then owners under whom the Plaintiff claims title; that, upon the land so conveyed, the canal, towing paths, and other works were or had been formed; that this strip of land was divided from the remaining portion by a ditch, which ran the whole length of it, and formed the boundary between the two properties. It then stated that, by different modes described in the bill, the Defendants had gradually encroached upon the Plaintiff's land, filling up the ditch, or the greater part of it, and ob-

literating

on the ground that the bill is open to a general demurrer for want of Equity.

A statement in an answer that certain documents admitted to be in the Defendant's possession form part of the evidence of his title, and do not form part of the title of the Plaintiff to the premises in question, is not sufficient to protect them from production on motion, if they be in their nature such as may furnish evidence in support of the Plaintiff's case, and the answer does not distinctly deny that they do.


Seemle, a Defendant who has answered cannot resist a motion for production of documents referred to in his answer, of Equity.

1845.

 The Marquis
 of BUTE
 v.
 The
 GLAMORGAN-
 SHIRE Canal
 Company.

literating the boundary; that quays and wharfs had been built along the canal upon land obtained for the purpose from the Plaintiff, and that the Defendants had received payments and acknowledgments by the parties occupying the quays and wharfs, which payments, though made in the first instance in respect merely of frontage, or of some benefit or accommodation received from the company, had in process of time been claimed and received as rent for a portion of the land covered by the quays and wharfs; that these occupiers were fifty in number, and that it would be impracticable to proceed at law for the purpose of defining the boundaries or recovering the possession. The bill then, anticipating the defence of the Statute of limitations, charged that the various acts of encroachment before-mentioned had been going on gradually and continually until a very recent period; that the Defendants now claimed to be entitled to twenty-four acres, being seven acres more than the original grant, and had put down boundary stones to mark the extent of their claim: the Plaintiff therefore prayed, among other things, for a commission to ascertain and settle the boundaries.

The Defendants, in their answer, denied the particular acts of encroachment with which they were charged by the bill, and stated that the filling up of the ditch, which they admitted to have been the original boundary, was not their doing, but the result, in part, of acts of the Plaintiff's own agents, but chiefly of the occupiers of the quays and wharfs, who (they said) had commenced the buildings upon the land of the Defendants before they applied for additional land to the Plaintiff, and had then filled up the ditch for the purpose of uniting the two: that those parties were their tenants, and that the payments were made in respect of the rent due from them as such tenants. The Defendants admitted that
 the

the number of acres which they now claimed was greater than that specified in their conveyance from the Plaintiff's ancestor ; but they insisted that, if there had been any encroachment, they had been in undisturbed possession of what they now claim for more than twenty years, and they relied upon the Statute.

1845.

 The Marquis
 of BUTE
 v.
 The
 GLAMORGAN-
 SHIRE Canal
 Company.

The Plaintiff, in his bill, charged that the Defendants were in possession of several maps, surveys, and other documents relating to the matters mentioned in the bill, and from which, if produced, the truth of such several matters would appear. The Defendants admitted, in their answer, that they had in their possession divers maps, surveys, and other documents relating to the matters aforesaid, and set out a list of them in a schedule : they also set out in another schedule a list of the leases which they had from time to time granted to the occupiers of the quays and wharfs ; but added, that they formed part of the evidence of the title of the Defendants, and did not form part of the title of the Plaintiff to the premises comprised therein.

The usual motion was made before the Vice-Chancellor of *England* for the production of the documents in question. This motion was refused with costs : the grounds of the refusal are not stated in the copy of the judgment which has been handed to me. It merely mentions, that the learned Judge had read the bill and answer, and that he was of opinion that there was no case for the production.

The Plaintiff has moved to discharge that order. The question is whether, having regard to the statements on the record, the Plaintiff is entitled to the production.

It

1845.

The Marquis
of EglarThe
GLAMORGAN-
SHIRE Canal
Company.

It is objected that this is a dispute between contiguous proprietors as to their actual bounds, that the remedy is at law, and that there is no ground for equitable interference. The rule, as I apprehend is this, that the mere confusion of boundaries between adjacent proprietors will not support a bill for a commission: there must be some equity arising out of conduct or acts of the party against whom the commission is prayed, or the bill must be brought for the purpose of preventing a multiplicity of suits. In the case of *Wake v. Conyers* (a) referred to by the Defendants, it is stated by the Lord Keeper (Norton), that the Court will entertain such a bill "where there might have been a multiplicity of suits, or the confusion has been created by the act of the parties, as where a party has ploughed too near or the like." I think the allegations in this bill entitle the Plaintiff to a commission: the bill alleges a system of gradual encroachment on the part of the Defendants, the filling up of the ditch, and altering the boundaries; and, further, the necessity that this Court should not interfere, of bringing a number of actions against different parties, in order to fix the boundaries and establish the Plaintiff's right.

I cannot, therefore, refuse the production on the ground taken at the bar, that no case for a commission has been made by the bill. If that indeed were the case, the Defendants might have demurred, and protected themselves from the discovery. But they have not thought proper to pursue that course; and, the possession documents relating to the Plaintiff's case being admitted, they are bound to produce them, unless they can show some special reason to excuse it. As

(a) 1 Eden, 551.

greater part, no reason is assigned why they should not be produced, except that they are their private books and relate to their general business — that they are in frequent use and cannot be removed: with respect to these the Court will do what is usual in such cases, — order that they should be inspected at the office of the Defendants at convenient times, and that such parts as do not relate to the matters in question in the cause may be sealed up on the usual affidavit. With respect to the leases, it is stated in the answer that they form part of the evidence of the title of the Defendants, and do not form part of the title of the Plaintiff to the premises in question. I think this is not sufficient: they are not asked for as evidence of the Plaintiff's title in the ordinary sense of the word, but as evidence of the allegations in the bill to entitle the Plaintiff to a commission. I do not, therefore, think this averment in the answer sufficient to excuse the production. The case in this respect is not unlike that of *The Duke of Beaufort v. Smith (a)*, decided first by the Vice-Chancellor Wigram, and which afterwards came before me upon appeal.

1845.
The Marquis
of Bute
v.
The
Glanbrook
Share Canal
Company.

It was further contended that the charges in the bill, upon which alone the suit could be supported, were contradicted by the answer, and that, until the right to maintain the suit should be established, the Court ought not to order the production of the documents; and the case of *Adams v. Fisher (b)* was cited in support of

(a) 1 *Hare*, 507., and *supra*, p. 209.

(b) 3 *My. & Cr.* 526. The argument of the Respondents on this point, as regarded the leases, was that, from their nature, they could not afford evidence of any

part of the Plaintiff's case, except that which went to rebut the defence of the Statute of Limitations; and that as all the allegations of the bill which imputed to the Defendants the ob-
literation and confusion of the

1845.


The Marquis
of BUTE

^a
The
GLANORGAN-
SHIRE Canal
Company.

of this position. But the right to maintain the suit is the very question to be tried, and the production of the documents is required with a view to the evidence, and for the purpose of establishing the right. They may be, and several of them are, I think, obviously material for that purpose. (a) In the case of *Adams v. Fisher*, the ground upon which Lord Cottenham's decision proceeded appears to have been, that it was evident from the nature of the documents, the production of which was required, that they would not assist in establishing the Plaintiff's equity: they were merely consequent upon it. "Whatever," he said, "may make out the Plaintiff's title, he may have a right to see. The documents in question, however, are not to make out *Adams's* title, to have the bills taxed, and the production of them could not possibly aid the assertion of the equity which *Adams* has asserted by his bill."

I am of opinion, therefore, that the order should be discharged, and that the documents ought to be produced.

boundaries, (and which, it was contended, constituted the sole foundation of his right to equitable relief,) were denied by the answer, the Plaintiff was, on the principle of *Adams v. Fisher*, not entitled to the production of any documents which were material only to a subordinate issue in the cause. It was not

adverted to in this argument, or perhaps in the answer above given to it, that the leases were all more than twenty years old, the latest of them being dated in the year 1815.

(a) The only documents comprised in the schedule besides the leases were certain maps and plans, and two minute books.

1845.

CARPMAEL v. POWIS.

1846.
March 25.

THIS was an appeal from an order of the Master of the Rolls allowing a demurrer by a solicitor to certain interrogatories exhibited for his examination in the cause on the part of the Plaintiff.

The object of the suit was to rectify an annuity deed by which, in consideration of 1800*l.*, the purchase-money of an estate which the Plaintiff had previously agreed to buy from the Defendant *Letitia Powis*, he had granted her an annuity of 176*l.* 10*s.* for her life, but which he insisted by his bill ought to have been only an annuity of 156*l.* 6*s.* 9*d.*, alleging that, according to a verbal agreement made between himself and *Thomas Powis*, the brother of *Letitia*, as her agent (and who was also a Defendant in the character of trustee under the annuity deed), the amount of the annuity to be granted by the Plaintiff was to be determined with reference to the rate at which Government annuities were granted on a particular day, and that *Thomas Powis*, having undertaken to ascertain that rate from a friend of his in the Government Annuity Office, had, owing to a mistake of his informant, stated it to the Plaintiff at nearly 22*l.* more than it really was, and that the parties had acted upon that mistake in determining the amount of the annuity which was inserted in the deed.

The bill suggested a pretence by the Defendant that the estate had been purchased by the Plaintiff at an under value; and it charged, amongst other things, that

previously

The privilege of communications between solicitor and client extends to all matters within the scope of the ordinary duties of a solicitor, and the sale of estates being one of such matters, it was held that a solicitor was not at liberty to disclose what had passed in conversations which he had had either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale.

But, *semble*, if the agent had been examined he would have been bound to answer.

If the question raised by the demurrer of a witness to interrogatories, be one which the Court can dispose of in that shape, it is bound to do so, and not to reserve the objection to the hearing.

1846.
 CARPMAEL
 v.
 POWIS.

previously to the sale to the Plaintiff, the Defendant had given instructions to her solicitor to sell it at auction, and had sanctioned a reserved bidding of an amount than the sum of 1800*l.*, which the Plaintiff agreed to give.

The defence set up by *Letitia Powis* was, that she had given her brother no authority in the matter; that she had inquired for her what amount of life annuity she could purchase with the proceeds of the estate; that he had never communicated to her the particulars of his alleged treaty with the Plaintiff, but had merely informed her that the Plaintiff had offered to grant her an annuity of 176*l.* 10*s.*, which offer she had, after some hesitation, authorized him to accept, and that she would not have accepted an offer of less amount.

The witness was the solicitor employed by *Letitia Powis* in the sale of the estate and in the purchase of the annuity.

The interrogatories demurred to were four in number.

By the first, the witness was asked whether he had, not, previously to the sale of the estate, some conversation with the Defendant, *Letitia Powis*, as to putting a reserved bidding upon it in the event of its being put to auction, and as to the investment of the proceeds, and he was required to set forth the particulars of such conversation.

In his answer to that interrogatory, he admitted that such conversation had taken place between him and the Defendant; but he declined to state the particulars "on the ground that they were confidential communications between the Defendant and himself as her solicitor."

The two next interrogatories related to two interviews between the witness and *Thomas Powis*, and to the conversations supposed to have taken place therein, relative to the transaction in question.

1846.

CARTMELL
v.
POWIS.

In answer to those interrogatories, the witness admitted that such interviews had occurred; but he declined to state the conversations which had taken place at them. "as, in all his communications with *Thomas Powis* on the subject of the transaction in question, he considered and treated him as representing his client, and as being the medium of communication between her and himself as her solicitor."

"For the same reason," he declined to answer the other interrogatory, — whether *Thomas Powis* ever told him that he was or was not authorized to agree with the Plaintiff as to the amount of the annuity to be granted to the Defendant *Leticia Powis*.

Mr. *James Parker* and Mr. *Stevens*, for the Plaintiff, the Appellant.

Mr. *Malins* and Mr. *Baggalley*, for *Leticia Powis*.

With respect to the first interrogatory,

It was argued, for the Appellant, that the communications therein referred to were not communications with the witness in his character of solicitor, inasmuch as they related to subjects on which the Defendant might have consulted with an auctioneer or any other unprofessional person just as well as with her legal adviser; *Bramwell v. Lucas* (a); the principle of which case, though not the application of it to the facts, had been recognised and

1846.


CARPMAEL
v.
POWIS.

and approved by Lord *Brougham* in *Greenough v. Gaskell* (a), and by Lord *Cottenham* in *Sawyer v. Birchmore* (b) and *Desborough v. Rawlins* (c); and that, in *Walker v. Wildman* (d), Sir *John Leach*, after adverting to the distinction between professional and non-professional matters, mentioned the treaty for the purchase of an estate as an instance of the latter.

On the other hand, it was contended that the privilege extended to communications on all matters falling within the ordinary scope of a solicitor's duty; *Jones v. Pugh* (e); and that the sale of estates for his clients was a familiar part of such duty; that the present case, however, fell within even the narrower limits of privilege contended for by the Appellant, inasmuch as the amount which it might be expedient to fix for a reserved bidding would, in many cases, depend upon the existence or non-existence of defects in the title, and other considerations in which legal advice might be of the utmost importance.

With respect to the other interrogatories,

It was contended that the privilege was confined to communications between solicitor and client, and that it was never extended to communications between either of these parties and a third person except when the necessity of the case required it; *Bunbury v. Bunbury* (g); *Steele v. Stewart*. (h) At all events, a witness relying on the privilege ought to state facts which would in law entitle him to it; *Parkhurst v. Lowton* (i); whereas
here

(a) 1 *Myl. & K.* 98.(b) 3 *Myl. & K.* 572.(c) 3 *Myl. & Cr.* 515.(d) 6 *Madd.* 47.(e) *Antè*, 96.(g) 2 *Beav.* 173.(h) *Antè*, 471.(i) 2 *Swanst.* 194. See p. 204.

here the witness had merely stated that he "considered and treated" *Thomas Powis* as representing *Letitia*: he ought to have stated, as a fact, that he did represent her. Independently of which objection, the question asked by the last interrogatory was a pure question of fact, which, on the principle before mentioned, would not be within the privilege even if the conversation to which it referred had passed between the witness and the client herself.

1846.
CARPMAEL
v.
POWIS.

On the other hand, *Walker v. Wildman* (a) was cited; and it was contended that the material point for consideration was not whether the third person to whom a communication was made by a solicitor did, in fact, represent the client, but whether the solicitor, at the time he made such communication, thought so: for whatever he communicated under that impression was evidently within the same principle as a communication made to the client personally.

It was further submitted, on the part of the Appellant, that, as the exclusion of the evidence which these interrogatories sought to elicit would be a serious prejudice to the Plaintiff, unless the Court was quite clear that the evidence, if taken, would not be admissible, the safest course was to allow the question to be put, and to reserve the objection to the hearing, as was done in *Sawyer v. Birchmore*. (b)

In answer to which,

The LORD CHANCELLOR said, that if he could dispose of the question now he was bound to do so; that the reason why Lord Cottenham in the case cited had reserved

(a) *Ub. supra.*

(b) *Ub. supra, vide p. 578.*

1846.

CARPRAEL

POWIS.

served the objection to the hearing was, because he could not finally dispose of it at the time. (a)

On the conclusion of the argument,

The LORD CHANCELLOR said — I am of opinion that the privilege extends to all communications between a solicitor, as such, and his client, relating to matters within the ordinary scope of a solicitor's duty. Now it cannot be denied, that it is an ordinary part of a solicitor's business to treat for the sale or purchase of estates for his clients. For some purposes his intervention is indispensable in such transactions: he is to draw the agreements, to investigate the title, to prepare the conveyance. All these things are in the common course of his business. But it is said that the fixing of a reserved bidding and other matters connected with the sale are not of that character, inasmuch as they might be entrusted equally well to any one else. It is impossible, however, to split the duties in that manner without getting into inextricable confusion. I consider them all parts of one transaction — the sale of an estate: and that a transaction in which solicitors are ordinarily employed by their clients. That being the case, I consider that all communications which may have taken place between the witness and his client in reference to that transaction are privileged.

The only other question is, whether the same privilege extends to the case of an intermediate agent. Upon that point *Walker v. Wildman* is precisely in point. There the communications were partly with the Defendant and partly with her son, and Sir *John Leach* thought both were within the privilege. And it is to be observed that he does not rest his decision

(a) The same point was so ruled in *Langley v. Fisher*, L.C., 10 April, 1845. Reported at the Rolls, 5 *Beav.* 443.

cision on the necessity of the case; for it appears that the Defendant was able to write, and it would seem, therefore, that there was no necessity for employing her son. The principle is laid down in the most general terms. And, so far as the solicitor is concerned, I do not see why it should not be so. It is not necessary to give any opinion as to what would be the case if the intermediate agent were examined. It may be that there you must go upon the necessity of the case. But here I have only the solicitor before me, which is a different thing.

1846.
CARPMAEL
POVIS.

As to the insufficiency of averment that the brother was the agent, I think that when the witness says he considered and treated him as his sister's agent, he must be taken to mean that he believed him to be so. And, indeed, it is impossible not to come to the conclusion, in point of fact, that the brother was the agent. The sister was not a person of business; and it was natural she should employ her brother's services in such a transaction. Besides, why should he have communicated with the solicitor at all if he was not acting for his sister?

I think, therefore, that, upon all the points, the decision of the Master of the Rolls was right. I say nothing as to how I should have decided if the question had been put to the agent, and it were not clearly necessary that an agent should be employed.

Appeal dismissed with costs.

1846.

June 6.

BUCK and Another v. SHIPPAM and Another


Where a composition deed between a debtor and his creditors provides, that those who come in under it shall thereby release their debts, a lien creditor cannot realize his lien and prove for the difference, but if he elects to take the benefit of the deed, must first give up the property on which he claims the lien.

THE Plaintiffs, who were hop merchants, in the month of *May* 1841 sold to one *Shippam*, a quantity of hops for 315*l.* 9*s.* 6*d.* Before the hops were delivered or paid for, *Shippam*, being insolvent, by a deed dated the 8th of *March* 1842, assigned all his property to the Defendants, in trust for such of his creditors as should execute it or accede to its provisions within three months; one of those provisions being, that the creditors who should accede to the arrangement, should, in consideration of receiving a rateable proportion of their debts with the rest, release *Shippam* from the debts set opposite to their respective names, and from all other claims and demands they had against him at the date of the deed. On the 10th of *March*, *Shippam* wrote to the Plaintiffs, informing them of the assignment, and suggesting, that it would be better for them to take to the hops than to come in under the deed with the other creditors. The Plaintiffs, however, declined to do so, and in the month of *April*, their solicitor applied to the Defendants, as the assignees of *Shippam*, for an authority to sell the hops; the Defendants thereupon consulted a Mr. *Oldacre*, a hop merchant in *London*, as to the course they should take, and were advised by him to authorize the Plaintiffs to sell the hops, and to let them prove for the deficiency, if any, with the other creditors; in consequence of which advice, the Defendants, on the 31st of *May* 1842, wrote to the Plaintiffs the following letter: —

“Gentlemen, If you think it a favourable state of the market, we shall feel obliged by your selling the hops

hops now in your possession and lying to our order, as the assignees of *John Shippam's* estate. When you have effected a sale, you will probably be kind enough to furnish us with the particulars. We remain, &c.

"S. & Co."

1846.

 BUCK
 v.
 SHIPPAM.

Notwithstanding that authority, the unfavourable state of the market during all the rest of that year prevented the Plaintiffs from effecting a sale, and, on the 5th of *December* 1842, they wrote to the Defendants, offering to take the hops at a valuation, and to receive a dividend of 5s. on the deficiency, such dividend having been already made among the other creditors. To that offer, however, the Defendants returned for answer, that as the Plaintiffs had not complied with the terms of the deed, they were not now entitled to any dividend under it, and that the Defendants would not, therefore, allow them to come in and prove. The Plaintiffs thereupon sold the hops by auction for 97*l.* 12*s.* 6*d.*, leaving a balance due to them (including warehousing and other charges for which, by the custom of the trade, they were entitled to a lien,) of 217*l.* 17*s.* 6*d.*, and then filed this bill, praying that the Defendants might be compelled to pay them a dividend of 5s. in the pound on that amount.

The answer having admitted that the Defendants had received assets sufficient for payment of 5s. in the pound to all the creditors, including the Plaintiffs, supposing them entitled, the only question in the cause was, whether the Plaintiffs were, under the circumstances, entitled to such dividend. The Vice-Chancellor of *England* held that they were not, and dismissed the bill with costs.

This was an appeal from that decision.

Mr.

1846.

By
Shippam

Mr. Wakefield and Mr. Glasse for the appeal.

The correspondence between the parties amounts to an accession, on the part of the Plaintiffs, to the stipulations of the deed; and entitles them to the same benefit thereof as if they had actually signed it. If, however, they had signed it, the debt to be set opposite to their names would have been the amount of the sale price to *Shippam* and their charges, minus the then value of the hops; and that is what they now seek to prove for. *Cullingworth v. Loyd* (a), which will be relied on by the other side, has no application; for the deed in that case contained an express stipulation, that the creditors who proved, should give up their securities on the debtor's estate; whereas the deed in this case contains no such stipulation; and the letter of the Defendants, the purport of which is explained by the advice of Mr. Olden in pursuance of which it was written, was, in effect, an admission on their part of the right which the Plaintiffs now contend for.

[The LORD CHANCELLOR.

The bill does not go upon personal liability in the assignees, but only upon the deed.]

Mr. Barker and Mr. Harrison for the Defendants.

By the contract of sale to *Shippam*, the property in the hops passed to him, subject only to the right of the Plaintiffs to retain them until the price was paid; and that property passed, by the deed of assignment, to the Defendants. On the other hand, the price of the hops, by the same contract, became a debt due from *Shippam*, and that debt the Plaintiffs, by the express terms of the deed (to which their case is that they have assented),

have

(a) 2 *Reav.* 385.

1846.

Buck

v.

SHIPPAM.

have released, in consequence of the benefits to be derived under that instrument. Such, being the rights of the parties, the Plaintiffs cannot claim a dividend without bringing in what they have realised by the sale of the hops, and which exceeds the amount of the dividend on their original debt.

Mr. Glasse in reply.

The LORD CHANCELLOR.

"If the Plaintiffs had sold the hops before the deed was executed, they would have been entitled to what they now contend for, viz. — to prove for the difference; for that would have been the amount of their debt at that time. But the moment a creditor releases his debt, which he does by executing a deed of this kind, there is, of course, an end of any lien he may have for it. From that time, therefore, the property of Shippam or his assignees, in the hops, became an absolute property, and the Plaintiffs had nothing in them, but the right to retain them till they were paid. The circumstance of Mr. Oldacre's communication does not vary the case. It is true, he gave his opinion, that the Plaintiffs could prove for the difference, and in that he was wrong in point of law; but it does not appear that any communication to that effect was made by the assignees to the Plaintiffs: their letter merely authorized a sale; the Plaintiffs, therefore, were not misled. I think there is no difference, in substance, between this case and that before the Master of the Rolls, and that the decision of the Vice-Chancellor must be affirmed.

1845.



1845.

Nov. 10. 11.

1846.

August.

In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband and wife, and each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture, should be conveyed to such uses as she should by deed or will appoint, and in default of appointment, to the use of herself for life, remainder to the use of the husband for

his life, remainder to the use of the wife's children, and in default of such children, to the use of *A. B.* (her niece) and her heirs. After the death of the wife without children, and without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate, to which she had become entitled during her lifetime, might be conveyed to the uses of the settlement. On the question whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece (who was also dead): Held, that it should extend to the latter, on the ground that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value.

DAVENPORT v. BISHOPP.

THIS was an appeal from a decree of Vice-Chancellor *Knight Bruce*, whose judgment is reported in the 2d volume of Messrs. *Younge and Collier's Reports*, p. 451.

The material facts of the case, which are detailed in that Report, are briefly stated in the Lord Chancellor's judgment.

Mr. Tinney, *Mr. Cooper*, and *Mr. Metcalf*, appeared for the Appellant, *Mrs. Bishopp*.

Mr. Bethell and *Mr. Amphlett* for the Respondent, the heirs of *Miss Lucas*.

Mr. Randall for the Plaintiff.

The argument on this occasion embraced all the points raised in the Court below.

The

1845.

DAVENPORT

v.

BISHOPP.

The case of *Sutton v. Chetwynd* was relied on by the Appellant's counsel, as shewing that the Court would not have lent its aid to the heirs of Miss *Lucas*, if they had been Plaintiffs, and it was argued that it would be strange if the rights of parties were to depend on whether they stood as Plaintiffs or as Defendants on the record. In answer to which, it was observed, that that apparent inconsistency (supposing it to exist) was unavoidable in a technical system of pleading, and that it was no reason why the Court should not deal with a case according to its established principles, that, if the same case were presented to it, in a different form, and by different parties, it might be prevented, by its rules, from giving the same measure of relief: that between *Sutton v. Chetwynd* and the present case, there was, however, this distinction; that in the former, if the Plaintiff had no equity, he had no right at all; for if this Court refused him relief, by way of specific performance, it would for the same reason refuse to compel the trustees to allow him to bring an action, in their names, on the covenant: whereas, in this case, the Plaintiff had a right of action at law, upon his wife's agreement with himself, and he merely asked this Court to do that directly, which, by enforcing his legal right, he might accomplish indirectly; for, with respect to this part of the case, it was not immaterial, that, in the event of such an action being brought, the very estate in question would be assets by descent, in the hands of Mrs. *Bishopp*, for satisfying the judgment, and that a Court of Law would not take notice of the equities between the parties for the purpose of abating the amount of damages; *Lethbridge v. Mytton* (a). And if it should be said, that a Court of Equity would restrain such an action, on the ground, that, as regarded the interest of Miss *Lucas*, there was no consideration for the

(a) 2 B. & Ad. 772.

1845.

 DAVENPORT
 v.
 BISHOPP.

the covenant, so far was that from being the case, that there were instances in which this Court had decreed specific performance of contracts under seal, on the principle of preventing circuitry of remedy; *Beard v. Nuthall* (a), and the other cases collected in *Randall v. Randall* (b).

On the question, whether the heirs of Miss *Lucas* had an equity independent of the interference of the Plaintiff in their behalf, it was argued, by the counsel for the Appellant, that if they had any such equity, it must have been purchased for them either by the Plaintiff or by his wife. That by the Plaintiff it could not have been, because, as he brought no property of his own into the settlement, there was no consideration moving from him but that of the marriage, the benefit of which would not extend to collaterals, even of his own blood, still less to a collateral relation of his wife's: neither could such an equity be considered to have been purchased by the wife; for the wife was, in this case, the settlor of the property, and, therefore, any limitations which might be supposed to have been introduced at her instance in favour of any party other than the issue of the marriage were purely voluntary; *Johnson v. Legard* (c): the only exception to that rule — at least in cases where the property moved from one of the parties to the marriage contract — being in favour of parties for whom the settlor was under a moral obligation to provide; as when a father by the settlement on his second marriage, made a provision for the children of the first.

In answer to that argument, it was insisted for the Respondent, that the foundation of the reasoning failed, for

(a) 1 Vern. 427.

(b) 2 P. Wms. 457.

(c) 5 Madd. 285.

for that the marriage was not, in this case, the only consideration moving from the husband, inasmuch as, although he did not bring any property of his own into the settlement, he gave up his marital rights in the future property of his wife — viz. in the personalty, his contingent right by survivorship, and in the realty, his estate as tenant by the curtesy; and that, even supposing the marriage to have been the only consideration moving from him, he might, for any thing that appeared, have stipulated for this limitation in favour of his wife's niece, and, as was observed by Lord Macclesfield, in *Edwards v. Lady Warwick* (a), and by Lord Hardwicke in *Goring v. Nash* (b), it was impossible to say which of the several stipulations in a contract the parties had laid the greatest stress upon: that *Vernon v. Vernon* (c), *Osgood v. Stode* (d), and *Goring v. Nash* (b) were on this point authorities for the Respondent, and not distinguishable from the present case. That if it should be said that those decisions were inconsistent with the dictum of Lord Langdale in *Cokear v. Lady Mulgrave* (e) — “that when two persons, for valuable consideration between themselves, covenant to do some act for the benefit of a stranger, that stranger has not a right to enforce the covenant against the two, although each one might as against the other” — the answer was, that the dictum was to be taken with some qualification; for that if A. contracted with B. for a benefit to C., and the consideration had actually passed and could not be returned, as in the case of marriage, his Lordship could hardly have meant to say, that in such a case, C. could not claim the benefit of the contract in a Court of Equity, when it appeared from *Marchington v. Vernon* (g), that he might even maintain an action upon it at law.

1845.

 DAVENPORT
 v.
 BISHOPP.

In

(a) 2 P. Wms. 171.


(b) 3 Atk. 190.

(c) 2 P. Wms. 594.

(d) 2 P. Wms. 245.

(e) 2 Keen, 98.

(g) 1 Bos. & Pull. 101.


1845.

 DAVENPORT
 v.
 BISHOPP.

In the course of the argument for the Respondent, the Lord Chancellor observed, that in *Stevens v. Truman* (a), one ground of the decision was, that, the contract being under seal, an action might be brought in the name of the trustees, and that in *Goring v. Nash*, Lord *Hardwicke* repeatedly laid it down, that if the Court interfered at all, it would execute the contract *in toto*.

Mr. *Tinney*, in his reply, said, with reference to that observation of his Lordship, that in those times the law on this subject was extremely unsettled, and that in most of the old cases grounds were stated for the decisions which would not now support them, though the decisions themselves might be reconciled with modern cases on other grounds which were still recognised: that the dicta to be found in some of the older cases with respect to the contract being under seal were an instance of this, the distinction, as he contended, being now exploded; and that if it were true that the Court could not execute a contract of this kind partially, there was an end of the Statute against fraudulent conveyances; for a party who wished to make a disposition of his property, which should be valid against his creditors, would have nothing to do but to insert in the deed a limitation to a purchaser for value, and that would give validity to the whole. With respect to the right of Miss *Lucas's* heirs to maintain the suit if they had been Plaintiffs, he insisted that what was a voluntary limitation for one purpose must be voluntary for another; and that if Mr. and Mrs. *Davenport* could, independently her power of appointment, have defeated the limitation to Miss *Lucas* by a sale to a purchaser for value, which could hardly be denied, it followed, as a necessary consequence,

(a) 1 *Ves.* sen. 73.

sequence, that the covenant, as regarded that limitation, was not supported by such a consideration as would give a title to sue in this Court for the performance of it.

1845.

 DAVENPORT
 v.
 BISHOPP.


The LORD CHANCELLOR.

1846.
July.

The facts of this case are fully stated in the report of the judgment of the Vice-Chancellor.

Upon the treaty for a marriage between *Samuel Davenport* and *Eleanora Roberts*, it was, by the deeds then executed, among other things, agreed by and between *Samuel Davenport* and *E. Roberts*, and each of them covenanted and agreed with the trustees, that, if the said *E. Roberts* should thereafter during the coverture become entitled to any property, real or personal, by any devise, gift, bequest, or otherwise, such property should be conveyed to trustees, so as that the same should be limited to such purposes as the said *E. Roberts* should, by deed or will, appoint, and, in default of appointment, to the sole and separate use of *E. Roberts* for life, and after her decease, to the use of *S. Davenport* for life, with remainder to the child or children of *E. Roberts*; but if there should be no such child or children, or descendant of any such child or children, living at the death of the survivor of *S. Davenport* and *E. Roberts*, then to the use of her niece *Mary Lucas*, her heirs and assigns for ever.

Mary Lucas was the daughter of *Mrs. Bishopp*, the sister of *E. Roberts*, afterwards *E. Davenport*. She died unmarried in 1823. In 1818, *Nedham Cheselden*, an uncle of *Mrs. Davenport* and of her sister *Mrs. Bishopp*, devised certain estates to trustees to the use of his wife for life, with remainder to the use of *Mary Bishopp*, his niece, for life, with remainder to *Mary Lucas*, her daughter by a former husband, for life, with remainder

1846.

 DAVENPORT
 v.
 BISHOPP.

unto his own right heirs. Mrs. *Davenport* and Mrs. *Bishopp* were his coheiresses. Mrs. *Davenport* died in 1839; Mrs. *Bishopp* survived her, and was her heiress-at-law. Mrs. *Davenport* never exercised her power of appointment.


The bill, which was filed by *S. Davenport*, prayed that Mrs. *Bishopp*, as the heiress-at-law of Mrs. *Davenport*, might be decreed specifically to perform the covenant contained in the settlement as to the estate devised by the will of *Nedham Cheselden*, so as to vest one moiety thereof, subject to the life interest of Mrs. *Bishopp*, in the surviving trustee, to the uses expressed in the settlement.

In this case there was an express covenant between *E. Roberts*, afterwards Mrs. *Davenport*, and her intended husband, and with the trustees, that any estate which might come to her during her coverture should be conveyed to trustees, to the uses expressed in the settlement.

This covenant was entered into for a valuable consideration, namely, the marriage between the parties. There is no reason, therefore, why the Court should not give effect to the covenant with *S. Davenport* by decreeing a specific performance. It is, I think, immaterial in this case that *Mary Lucas* was no party to the consideration.

In the case of *Sutton v. Chetwynd*, which was relied upon in the argument for the appellant, the covenant was between Lady *Bath* and the trustees only. There was no consideration moving from them or from Sir *Richard Sutton*. With respect to Sir *James Pulteney*, he merely consented to the settlement. Lady *Bath* did
 not

not covenant with him. In the present case, the parties to the consideration,—viz. the marriage,—mutually and in express terms covenanted with each other as well as with the trustees.

1846.

 DAVENPORT
 v.
 BISHOPP.

Instances were cited of marriage settlements, which were, as to some of the limitations, considered to be voluntary, and were set aside in favour of purchasers. But this is not the case of a purchaser, and it is unnecessary, therefore, to consider how far those cases are in other respects distinguishable from the present. In *Goring v. Nash*, Lord *Hardwicke* observes: “The strict measure which governs the Court in a question between persons who come to carry articles into execution and purchasers, is not the rule of this Court [between families], for between families the Court have considered whether a superior or inferior equity arises on the part of the person who comes for a specific performance.” “It is one consideration,” he adds, “how far the Court will support agreements of this kind against relations in a family, and another against purchasers and creditors.”

I may further observe, that, as far as *S. Davenport* himself is concerned, it is not disputed that a specific performance would be executed; but the Court, being in possession of the cause, will not divide the covenant, and decreeing a special performance in favour of the Plaintiff as to part, send him to law as to the residue. Lord *Hardwicke*, in the same case of *Goring v. Nash*, observes, that where marriage articles have been decreed at all, they have been carried into execution even as to collaterals, and not carried into execution in part only. I think, therefore, the judgment must be affirmed.

1846.

June 11.

MITFORD v. REYNOLDS.

On exceptions taken by the Plaintiff to a Master's report, it appearing that a material element of the enquiry had been overlooked by the Master, the Court referred it back to him to review his report, not allowing or disallowing the exceptions, but ordered the deposit of 10*l.* to be returned, although the omitted enquiry had not been suggested, nor any evidence offered upon it by the Plaintiff before the Master, the Court being of opinion, that, from the nature of the reference, the onus of suggesting such enquiry lay on the Defendant rather than on the Plaintiff.

THIS case, the original hearing of which is reported *suprà*, p. 185., now came on upon exceptions taken by the Plaintiff (who was the testator's widow) to the Master's report, upon the reference made to him by the decree to enquire what sum would be reasonably required for the purpose of carrying into effect the directions of the testator as to the erection, on a certain piece of land, of a mausoleum for the interment of himself and his family. (*a*)

The Master, by his report, certified that the sum of 1269*l.* 8*s.* would be reasonably required for that purpose, founding himself exclusively upon the evidence of surveyors as to the value of the piece of ground, but without going into any enquiry as to what the owner of the piece of ground was willing to take for it. After stating the conclusion at which he had arrived, and the evidence on which it was founded, he added that a state of facts was laid before him on the part of the Plaintiff, with an affidavit in support of it, to the effect that the object pointed out by the testator was impracticable both on the ground of the impossibility of removing the bodies of himself and his parents to the proposed place of interment, and also of the absolute refusal of the owner of the piece of ground to part with it: but that he had disallowed that state of facts as not within the reference.

One of the exceptions applied to his disallowance of that state of facts; and by another it was insisted that he

(*a*) *Vid. suprà*, p. 199.

1846.


MITFORD
v.
REYNOLDS.

he ought to have directed proper enquiries and applications to be made to the owner of the piece of land, for the purpose of ascertaining whether he was willing to sell or dispose of it, and, if so, at what price, and that he ought to have made his report as to the result of such enquiry. Another exception went to the correctness of the finding generally.

Mr. Bethell and *Mr. Heathfield*, for the Plaintiff, in support of the exceptions.

Mr. Wigram and *Mr. Lloyd*, for the *East India Company*, contended that the Master was right in treating the practicability of the object as not within the reference, and that that was a question solely between the executors and the next of kin, with which the Charity had nothing to do. And as to the omission to enquire what the owner would take for the land, they submitted that, as the Plaintiff had not suggested any such enquiry, or offered any evidence upon it before the Master, except with reference to a state of facts relating exclusively to another view of the case, and which the Master had properly refused to entertain, she could not take advantage of the omission (even supposing it were one) upon exceptions to the report, and that the exceptions being unsustainable on all other points, they ought to be overruled.

The LORD CHANCELLOR.

Suppose surveyors, looking only to the abstract value of the property, estimated it at 100*l.*, the owner might say he would not take that, but that he would sell it for 150*l.* That might perhaps be more than the abstract value of the property, but yet it might be a reasonable sum to be paid for it with a view of carrying the tes-

1846.

MITFORD

v.

REYNOLDS.

tator's wishes into effect. The ascertainment, therefore, of what the owner was willing to take, was a point absolutely essential to enable the Master to come to a conclusion on the question referred to him. It appears, however, that he has, in fact, formed his conclusion without any enquiry upon that point.

It was said that that was the fault of the Plaintiff, in not raising the point and offering evidence upon it before the Master. But what was the object of the reference? The Charity was to have this residue after deducting a sum for another purpose. It was for the Charity to establish affirmatively what that sum was to be. The onus was on the Charity to shew that. I am of opinion, however, that they have not shewn it satisfactorily, and that the Master has come to his conclusion upon imperfect evidence and on insufficient grounds, and, therefore, that the reference must go back to him, in order that he may make further enquiry, and, if necessary, amend his report.


After some discussion upon the terms in which the reference was to be sent back,

The LORD CHANCELLOR said,

I must adhere to the terms of the original reference which assumes that the owner was willing to part with the land, there being then no suggestion to the contrary. I cannot assume the contrary now, for it would be going out of the reference, though, from what has passed on this occasion, I cannot help seeing that the owner of the land is determined not to sell it.

The order, after stating that His Lordship did not think

think fit to make any order allowing or over-ruling the exceptions, referred it back to the Master to review his report, with a direction that, in proceeding with the reference in question, he was to enquire on what terms, if any, the owner of the land would sell the same, and he was to state the result of such enquiry with his opinion thereon: any of the parties were to be at liberty to apply, and the deposit was to be returned; the costs of all parties of the exceptions to be costs in the cause. The order to be without prejudice in the cause, and further directions to stand over in the meantime.

1846.

 MITFORD
 v.
 REYNOLDS.

Reg. Lib. B. fol. 1250.

NOTE.—See *Hodges v. Cardonnel*, 2 *Atk.* 408., from which it appears that, where the omission to bring proper facts or evidence before the Master is the fault of the party excepting, the Court will not send the matter back to the Master, but upon the terms of the exceptant giving up his deposit.

1846.

April 17.
August.

INNES v. MITCHELL.

Gift of an annuity of 300*l.* to the testator's three daughters and the survivors and survivor, with a gift over to the last survivor of the sum set apart to answer the annuity.

After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two: but after their deaths a sum of money, forming part of the residue but of less amount than the original fund, becoming available, Held, that such sum was to be apportioned rateably between the arrears due to the two surviving

daughters respectively at the time of the death of that one of them who died first, and the sum originally set apart, and which belonged to the last survivor.

WILLIAM INNES, by his will, dated the 12th December 1789, among several other bequests, gave to his three natural daughters, *Ann*, *Sophia*, and *Heriot*, the yearly sum of 300*l.* amongst them, and to the longest liver; and he directed that "a sufficient sum should be invested in the public funds in the names of his executors as trustees for the three sisters, who were to divide the 300*l.* equally between them while all of them were alive, and to the longest liver of them the whole." In a codicil, which was intended to be explanatory of some of the dispositions contained in the will, the testator gave and bequeathed "the 300*l.* a year to be equally divided between the sisters during their lives and to the longest liver, when the stock which produces that sum may then be sold for the use of such longest liver and her heirs." And he appointed his said three daughters his residuary legatees.

The testator died in 1795, and a sum of stock having been duly set apart by his executors to answer the annuity of 300*l.*, that annuity was regularly paid to the three daughters until the year 1800, when *Sophia* died, after which it was regularly paid in equal moieties to the two survivors until the year 1816, when *George Mitchell*, the surviving executor, died insolvent, having sold out the stock which had been set apart to answer the annuities: in consequence of which, there being then no other part of the testator's estate available for the

the payment of the annuities, they ceased to be paid. In the year 1845, however, a sum of 7380*l.* 1*s.* 6*d.*, three per cents., which had been set apart to answer another annuity to one *Janet Innes*, and which, subject to her annuity, was to form part of the testator's residuary estate, was released by her death. At that time the two sisters who had survived were dead. *Heriot*, who had married Colonel *Stewart*, had died in 1837, and *Ann*, who was the widow of the said *George Mitchell*, in the early part of 1845. On the death of Mrs. *Stewart*, the arrears of her moiety of the annuity from the year 1816 amounted to 3150*l.* On the death of Mrs. *Mitchell*, the arrears due to her amounted to upwards of 5000*l.*

1846.

 INNERS
 v.
 MITCHELL.

Under these circumstances, the question arose, in what proportions and upon what principle the 7380*l.* 1*s.* 6*d.* stock was to be divided between the representatives of Mrs. *Stewart* and Mrs. *Mitchell*. The share of Mrs. *Stewart* was claimed by her husband; that of Mrs. *Mitchell* by certain nephews and nieces of her's to whom she had by her will specifically bequeathed all her interest in this fund.

The question was brought before the Vice-Chancellor of *England*, upon the petition of Colonel *Stewart*, who contended that the arrears of the annuities were to be paid in full, in the order in which they had accrued due: and the Vice-Chancellor, adopting that principle, ordered that the stock should be sold, and that out of the proceeds, after payment of costs, the sum of 3150*l.*, being the amount of the arrears due to Mrs. *Stewart* at the time of her death, should be paid to Colonel *Stewart*, and the residue of the fund (which it was clear would exceed that amount), to the parties claiming under Mrs. *Mitchell*.

The

1846.

 INNES
 v.
 MITCHELL.

The legatees of Mrs. *Mitchell* appealed from the decision, and the appeal petition now coming on to be heard,

Mr. *J. Parker* and Mr. *Miller*, for the Appellants, contended that the decision of the Vice-Chancellor was erroneous in two respects: first, in having allowed a priority to the arrears, as between themselves, according to the order in which they accrued; secondly, in allowing a priority to the arrears of the annuities over the ultimate gift of the corpus of the fund; whereas they insisted that the annuities and the corpus of the fund were to be considered as distinct co-ordinate gifts, between which there was no priority, and that the fund in question ought therefore to have been distributed rateably in payment of what remained due in respect of each. In support of which they cited *Hume v. Edwards* (a), *Beeston v. Booth* (b), *Bowker v. Bowker* (c), *Taylor v. Taylor*. (d)

Mr. *Bethell*, Mr. *Stuart*, and Mr. *Follett*, for the Respondents, contended that, from the terms of the gift, the primary object of the testator appeared to have been to secure a provision for his daughters during their lives, and that the annuities were charged upon the corpus of the fund, and not merely on the income: but that, at all events, a contingent gift to one of several present objects could not be taken into account for the purpose of derogating from what each of those objects would for the time being be entitled to but for that contingent gift; in illustration of which they referred to the rule by which, under a gift to such of a class of children as should attain twenty-one, the Court allowed main-
 tenance

(a) 3 *Atk.* 693.

(b) 4 *Mad.* 161.

(c) *Sct. Decr.* p. 70.

(d) 8 *Jurist.* 15.

tenance out of that fund to all the children during their minorities. They also relied on *Davies v. Wattier* (a) and *May v. Bennett* (b), where the fund set apart to answer an annuity having, in consequence of the conversion of the stock from 5 to 4 per cent., proved insufficient for the purpose, it was held that the annuity should be made good out of the residue of the estate. They further insisted that the cases cited on the other side furnished no guide in the present. For in those cases the deficiency of the fund was apparent at the death of the testator, and the course pursued was to put a prospective value upon each of the claims which were to be satisfied out of it, and apportion the fund rateably between them. Here the deficiency did not occur till a subsequent period, and the subsidiary fund fell in still later. How, they asked, could such a case be dealt with but according to the principle of the Vice-Chancellor's order? Was the value of the annuities to be ascertained prospectively from the death of the testator, or from the time when the fund was lost; or was the event only to be looked at, and the claims of the parties to be measured by the amount of arrears which actually became due between the loss of the fund and their respective deaths?

1846.

 INNES
 v.
 MITCHELL,

Mr. *Cooper* and Mr. *Evans* appeared for the personal representative of Mrs. *Mitchell*, who was also the personal representative of the testator, but took no part in the argument.

Mr. *J. Parker*, in reply, observed that the cases of *Davies v. Wattier* and *May v. Bennett* had no application; for the contest there was between the annuitants and residuary legatees. There was no doubt in this case that the fund in question, which was part of the residue, was applicable to make good the claims of particular legatees:

(a) 1 *Sim. & St.* 463.

(b) 1 *Russ.* 370.

1846.

INNES

v.

MITCHELL.

legatees: the only question was, how it was to be portioned between them. As to the rule which allowed interim maintenance to children contingently interested in a principal fund, it rested on this principle, that if the children were of age, they could agree to be maintained out of the fund pending the coming of age, and as such an arrangement was obviously for their benefit, the Court made it for them. That rule, therefore, afforded no illustration of the doctrine which was cited to support, and for which there was no authority. As to the various principles of apportionment which had been suggested, valuation was out of the question; for the annuitants being dead, their respective interests were ascertained by the event; and that in the case, it was immaterial whether, in calculating the amount of their claims, the death of the testator or the loss of the original fund was to be taken as the starting point: for in both cases the amount would be the same, the difference between the amount which they had actually received and that which they would have received if the fund had not been lost.

The LORD CHANCELLOR.

Suppose a gift of an annuity of 300*l.* to *A.* and the survivor, with a direction to set apart a fund to answer it, and a gift of that fund to the survivor, and that the assets were only sufficient to answer an annuity of 200*l.*; what do you say would be the course the

Mr. Parker.

It would be precisely this case, with the exception that the deficiency would be apparent from the beginning instead of arising by subsequent events. And I submit that the annuitants would receive only 200*l.* a year until one died; that, on his death, there w

1846.

 INNES
 v.
 MITCHELL.

be a certain amount of arrear due to him, in respect of which his personal representative would have a claim on the fund. On the death of the survivor, an arrear would, in like manner, be due to him, in respect of which his personal representative would have a like claim, though of a different amount from the first; and he would have a further claim in respect of the gift of the corpus. (a) So that the fund would then be subject to three claims: the amount of arrears due to the first annuitant who died; the amount of arrears due to the survivor; and the amount of the corpus of the fund itself: and it would have to be distributed rateably between these three claims, which is what I have contended for in this case.

No account of interest was asked on either side.

The LORD CHANCELLOR's judgment, which embraced various other points of detail not material to the question above discussed, was, so far as regarded that question, as follows:—

The LORD CHANCELLOR.

The principal question in this case relates to the manner in which the produce of the sale of 7380*l.* 17*s.* 6*d.*, stock released by the death of *Janet Innes*, is to be applied. [His Lordship then stated the clauses of the will and codicil relating to the gift in question, and proceeded.] Under this bequest, the daughters would be entitled, each of them, to an annuity of 100*l.* a year during their joint lives, and, after the death of one of them, each of the survivors would be entitled to an annuity of 150*l.* a year as long as they should both live. The ultimate survivor would be entitled to the whole fund.

The

(a) But see note to next page. †

1846.
 LIVES
 v.
 MITCHELL

The rule is settled, that, where there is a deficiency of assets, annuities abate equally with other legacies. Whether an annuity is to commence immediately at the death of the testator or at a future period, or, as I conceive, upon a contingency capable of being valued, the principle will equally apply. If they abate with reference to other legacies, they must, of course, abate between themselves. All the events having occurred, there is no necessity in this case for any valuation. Had the 10,000*l.* been invested, the sums which were in arrear at the death of Mrs. *Stewart* would have been paid in full, as they successively became due, out of the dividends, and the fund so invested would have become the property of Mrs. *Mitchell*. The stock which has since fallen in is insufficient to satisfy the whole of these claims. They must therefore abate, and the amount received be applied, *pari passu*, in discharge of the arrears up to Mrs. *Stewart's* death, and of the sums so directed to be invested, and which goes to the survivor. (a)

The cases cited on the part of the Respondent—*Davies v. Wattier* and *May v. Bennett*—have no application to the present question. The contest in those cases was between the annuitant and the parties entitled to the residue. Here the question relates to the conflicting claims of different annuitants. The distinction is obvious.

Let the order, therefore, be varied according to the principle which I have stated.

(a) It will be observed that this principle of distribution differs from that contended for by the Appellant's counsel, inasmuch as the arrears of Mrs. *Mitchell's* annuity between her sister's death and her own are not taken into account. If they

had been, it would have been equivalent to giving her (in the form of the annuity) interest on the principal fund from her sister's death, while no interest was given to the sister in respect of her arrears.

1844.

Nov. 12.

1845.

Jan. 20.

1846.

August.

FORBES v. PEACOCK.

THIS was an appeal from a decision of the Vice-Chancellor of *England*, whose judgment, with all the particulars of the case, is reported in the 12th vol. of *Mr. Simons's Reports*, p. 528.

It will be seen from that Report that the material circumstances of the case were shortly these: — A testator, after directing all his just debts to be paid, devised his real estate to his wife for her life with power to sell it, in case a good offer should be made, and invest the proceeds in the funds; with a direction that, if not previously sold, it should be disposed of at her death, and that the proceeds should be divided, with the residue of his property, among certain persons; and he appointed three persons executors and trustees of his will. The testator's widow survived him twenty-five years; and, on her death, in the year 1840, the Plaintiff, who was then the sole surviving trustee, contracted to sell the estate to the Defendant.

In the course of the investigation of the title before the Master, the Defendant enquired of the Plaintiff, whether all the debts were paid, to which question the Plaintiff refused to give any answer. The Master, nevertheless, reported in favour of the title. The Defendant took exceptions to the report, on the ground, amongst others, that as the length of time since the testator's death, and the refusal of the Plaintiff to answer

The rule which relieves a purchaser from seeing to the application of the purchase-money, when the estate is subject to a primary general charge of debts, has reference to the time of the testator's death, and does not cease to be applicable, though the debts be subsequently paid; and, therefore, where an estate so charged was sold by the trustee, it was held that the *cestuis que trust* were not necessary parties to the conveyance, though the sale did not take place till twenty-five years after the testator's death, and the vendor, on being asked by the purchaser whether all

the debts were not paid, had refused to answer the question.

1846.

FORBES
v.
PEACOCK.

answer his question, afforded a presumption that all the debts had been paid, the Plaintiff could no longer give a valid discharge for the purchase-money without the concurrence of the *cestuis que trust*.

The Vice-Chancellor allowed that exception, and on further directions dismissed the bill, thereby overruling *Page v. Adam*. (a)

The appeal now came on to be argued by

Mr. Cooper and Mr. James Parker, for the Plaintiff (the Appellant).

Mr. Coote and Mr. Bird, for the Defendant.

The counsel for the Appellant made three points, the two first of which were founded upon the general charge of debts. First, they contended that the question whether a trustee had power to give a discharge for purchase-money was purely a question of construction of the instrument under which he derived his power to sell, and that a general charge of debts was in effect, a constructive power to the trustee to give such discharge: in support of which, they relied on the dictum of his Lordship in *Johnson v. Kennett* (b), confirmed extra-judicially by Lord Cottenham in *Eland v. Eland* (c), and adopted by the Master of the Rolls in *Page v. Adam*, "that the rule which, in such a case, exempted a purchaser from seeing to the application of the purchase-money, had reference to the state of things at the death of the testator, and that if the debts were afterwards paid, leaving the legacies alone charged, that could not vary the rule."


But,

(a) 4 *Beav.* 469.

(c) 4 *My. & Cr.* 429.

(b) 3 *My. & K.* 631.

But, secondly, they argued that, supposing notice of the debts having been paid to be in any sense sufficient to take the case out of the rule, it must, at all events, be actual and not merely constructive notice—that is to say, actual knowledge of the fact that the debts had been paid, and not merely knowledge of circumstances from which the fact might be inferred, and therefore imposing the duty of enquiry; for the very object of the rule was to relieve the purchaser from the responsibility of making such enquiry. (a) If that was so, it followed that the enquiry which in this case had been addressed by the Defendant to the Plaintiff was impertinent, and that no inference could fairly be drawn from the Plaintiff's refusal to answer it.

1846.

 FORBES
 v.
 PEACOCK.

Thirdly, they contended that the decision of the Vice-Chancellor in this case was erroneous, independently of the general charge of debts: for that although it was the settled doctrine of the Court that an express power or trust to sell did not of itself necessarily involve a power to give discharges, it was perfectly consistent with that doctrine, that where the former, being the greater, power arose, as in this case, by implication, it should carry with it the latter as an accessory: and that in the case, at least where the proceeds of the sale were to be applied by the executors in a mixed fund with the residuary personal estate, which was also the case here, *Tylden v. Hyde* (b) was an express authority for that double implication.

The counsel for the Respondent said, that if the rule which had been referred to was, as had been contended,
 purely

(a) *Per Lord Cottenham,*
Eland v. Eland, ub. sup.

(b) 2 *Sim. & St.* 238.

1846.

FORBES

v.

PEACOCK.

purely a rule of construction, it was strange that such a doctrine had never been distinctly laid down in any of the numerous cases which had arisen upon the subject, although it would have furnished a simple and conclusive answer to the various questions which had been raised as to the application of the rule under particular circumstances. That such a doctrine was not borne out by the dictum which had been cited in support of it, but rather the contrary: and that no decision was to be found confirmatory even of that dictum, except that of *Page v. Adam*. That it was not inconsistent with that decision still to say, that the only thing that could exempt a purchaser from liability for the due application of the purchase-money was the existence of debts to be paid out of it, and that it was sufficient to make him liable if the facts within his knowledge were such as on the ordinary principles of constructive notice, as explained in *Jones v. Smith (a)* and previous cases, to lead him to the inference that all the debts had been paid, which they insisted was the case here.

All the other authorities referred to in *Mr. Simons's Report* were cited and commented upon.

The LORD CHANCELLOR.

In this case the testator charged his real estate with the payment of his debts, and directed it to be sold upon the death of his wife, if not sooner disposed of, and the proceeds, with the residue of his personal estate, to be divided among certain of his relations. The executors, being thus empowered to sell the real estate, the surviving executor entered into a contract for that purpose with the Defendant.

(a) *Antè*, p. 244.

Twenty-five years had elapsed since the testator's death, and the Defendant by his solicitor enquired whether there were any debts due from the estate which remained unsatisfied, and if not, whether the *cestuis que trust* would give authority to sell. To this question no answer was returned.

1846.

 FORBES
 v.
 PEACOCK.

The Vice-Chancellor was of opinion that this, under the circumstances, amounted to notice to the purchaser that the debts were paid, and that he was therefore bound to see that the purchase-money was properly applied. It followed that the concurrence of the *cestuis que trust* was necessary to enable the purchaser to make a good title.

The question is, whether the opinion of the Vice-Chancellor can be sustained.

The estate being charged in the first instance with the payment of debts, the Defendant was not bound, according to the general rule, to see to the application of the purchase-money. If, indeed, he had notice that the vendor intended to commit a breach of trust and was selling the estate for that purpose, he would by purchasing under such circumstances be concurring in the breach of trust, and thereby become responsible. *Watkins v. Cheek* (a); *Balfour v. Welland* (b); *Eland v. Eland*. (c)

But assuming that the facts relied upon in this case amount to notice that the debts had been paid, yet as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the

(a) 2 Sim. & St. 199.

(b) *Ub. suprâ.*

(c) 16 Ves. 151.

1846.

FORBES
v.
PEACOCK.

the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this,—if authority is given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, is he bound to see to the application of the purchase-money? I apprehend not.

In the case of *Johnson v. Kennett*, where it was contended that the rule did not apply, because the debts had been paid before the sale took place, I held that the rule had reference to the death of the testator, and, therefore, that even supposing the debts were paid before the sale took place, and that the legacies alone remained as a charge, that circumstance would not vary the general rule. (a)


The

(a) If notwithstanding this decision it should still be inferred from the terms of the dictum in *Johnson v. Kennett*, that the rule would not apply to a case in which it should happen that there were no debts due at the testator's death, and that the purchaser knew it, I have the authority of Lord *Lyndhurst* for stating that he did not intend on that occasion to lay down any rule which should govern such a case; and that the guarded and somewhat qualified terms in which the dictum is referred to and adopted in this case were used for the express purpose of excluding that inference.

Should it be held that the rule applies to a case of that descrip-

tion, it would seem to follow inevitably (if indeed it be not apparent from the current of existing authorities) that the rule is, as was contended by the counsel for the appellants in the principal case, an absolute rule of construction, and not one depending for its application on the state of the testator's affairs, either at the time of his death or at any other period. Indeed it seems difficult to understand how it should ever have been considered otherwise. *Balfour v. Welland* is an instance in which an absolute power to give discharges for the purchase-money was implied, even in a deed, from the nature of the trusts to be performed. And in cases

The Vice-Chancellor assents to the correctness of this opinion which was adopted by Lord *Langdale* in *Page v. Adams*, and sanctioned by Lord *Cottenham* in *Eland v. Eland*. I see no reason to depart from what I then stated, and as this case falls, I think, within the same rule, I must direct the judgment to be reversed.

1846.

FORBES
v.
PEACOCK.

of the class now under consideration, the implication of a similar power amounts to nothing more than attributing to the mind of the testator a sense of that necessity for the trustees'

having such a power where they are directed to pay debts, which the Courts have always acknowledged, where there have been debts to be paid. — *Note by Reporter.*

REPORTS

OF

CASES

1845.

ARGUED AND DETERMINED

IN THE

HIGH COURT OF CHANCERY.

JONES v. GEDDES.

An injunction granted on a suggestion of fraud, to restrain a party resident in *England* from prosecuting a suit in the Court of Session in *Scotland*, to enforce a legal security against lands situate in that country, was on appeal dissolved, on the ground that, although the remedy afforded by

this Court in cases of fraud was more effectual and complete than in the *Scotch* Court, the question between the parties in this case might, upon the whole, be more conveniently litigated, and with a more conclusive result, there than here.

THE Plaintiffs were the assignees of a bankrupt, who was entitled to real estates in *Scotland*, which he had charged with various heritable securities. The bill prayed that a heritable bond, one of those securities, bearing date a few months before the bankruptcy, and alleged to have been executed for a colorable consideration and in fraud of the creditors, might be set aside and delivered up to be cancelled, and that the Defendants, the obligees, who were resident within the jurisdiction, might be restrained by injunction from prosecuting a process of ranking and sale which they had commenced in the Court of Session for the purpose of realising their security.

The

The case now came on upon a motion to dissolve an injunction granted by the Vice-Chancellor of *England*.

1846.

JONES

v.

GEDDES.

The affidavits made a clear case for an injunction, if the property had been situated in this country; and the argument turned upon the question how far the discretion of this Court, in the exercise of its jurisdiction by injunction, was to be influenced by the pendency of the proceedings in *Scotland* and the effect which its interference might have, in certain events, upon the position of the Defendants in reference to those proceedings.

The substance of the affidavits, bearing upon that point, will be seen from the Lord Chancellor's judgment.

Mr. *James Parker* and Mr. *Colvile*, for the appeal motion.

Mr. *Swanston* and Mr. *Shapter*, *contra*.

The LORD CHANCELLOR.

Dec.

The assignees in this case are entitled to the estate subject to the rights of the persons holding heritable securities, and among others to the rights of the Defendants in this suit. They stand in this respect precisely in the same situation as the bankrupt whom they represent. The claims may be enforced against the estate in the hands of the assignees in the same manner as if it still continued in the bankrupt, the only difference being, that by the bankruptcy the assignees have become the owners of the estate instead of the bankrupt, and will be entitled, when the estate is sold under the process of

1846.

JONES

v.

GEDDES.

ranking and sale to the surplus after payment of the charges upon it, instead of the bankrupt. Under this process the validity of the bond, if contested, may be tried and decided; and the facts relied upon by the assignees would be equally available to defeat the claim in the Court of Session as in this Court. But still, as the parties reside here, the Court of Chancery has jurisdiction to try and decide the question of fraud, and, if established, to order the instrument to be delivered up to be cancelled; and it may entertain the suit, although the proceeding by ranking and sale has already been commenced in the Court of Session.

The question for consideration in these cases is by what course of proceeding would justice, under all the circumstances, be most advantageously administered.

Now it is said, and I think truly, that the mode of investigation in this Court is more effectual for the discovery of fraud than in the Courts of *Scotland*, and, further, that this Court can order the fraudulent instrument to be delivered up to be cancelled, which cannot, it appears, be done in the proceeding now pending in the Court of Session.

In this view of the case it would seem proper that the injunction should be sustained; and if it were certain that the fraud would be established, there would, as it strikes me, be no inconvenience in this course of proceeding. But as this possibly may not be the case, it will be proper to consider what will be the effect of restraining the parties from proceeding in *Scotland*, should the validity of the bond, in the result of the suit here, be established. The obligees will have been materially prejudiced as to their remedy against the estate; other heritable creditors might, and, according to the usual course,

course, would, be substituted in the ranking and sale for those defendants, who would be considered as having withdrawn their claim, and the proceedings would be carried on by them. In the result the property would be sold under the order of the Court of Session, and after paying the creditors, parties to that process, the surplus would be handed over to the assignees. Such appears by the affidavits to be the usual course, and it cannot safely be assumed that the Court of Session would, under the circumstances of this case, depart from its ordinary rules.

1846.

JONES

v.

GEDDES.

It is suggested, indeed, that the Court of Session might, in consequence of the injunction, order the proceedings to be suspended till the decision of the suit in this Court. But that is very improbable, because it would be unjust to the other creditors, whose titles are unimpeached, to delay them in enforcing their just rights until the decision of a cause with which they have no concern. It is the more unlikely that the Court of Session would do this, when it is considered that the proceedings in that Court were prior in point of time to the institution of the suit here. But, even supposing that the Court of Session should suspend the proceedings in order to await the decision of this Court, and the bond should be established, that decision would not be final. The validity of the instrument might still be questioned by the parties to the process of ranking and sale in *Scotland*.

Upon the whole, then, after weighing the conveniences and inconveniences of the different courses to be adopted, I think it is not advisable to interfere with the proceedings in the Court of Session, and that the injunction ought, therefore, to be dissolved.

1846.

June 3.
Dec.

WHITWORTH v. GAUGAIN.

Notwithstanding the stat. 1 & 2 Vict. c. 110., which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an *elegit* without notice of the mortgage.

THIS was an appeal by the Defendants from a decree of Vice-Chancellor *Wigram* in a suit by an equitable mortgagee against two judgment creditors of the mortgagor, who had obtained possession of the mortgaged estate under *elegits*.

The details of the case are fully stated in *Cr. & Phill.* 325., and 3 *Hare*, 416. The principal authorities relied upon in the argument, will be found in the Lord Chancellor's judgment. The other authorities mentioned in Mr. *Hare's* report were also referred to.

Mr. *Romilly* and Mr. *Whitworth* appeared in support of the decree.

Mr. *Walker*, Mr. *Russell*, and Mr. *Terrell*, for the Appellants.

The LORD CHANCELLOR.

This is an appeal from a decree of Vice-Chancellor *Wigram*. The only question is whether the equitable mortgagee in this case is entitled to priority over the *elegits* and judgments. The equitable mortgage was created by the deposit of title deeds, accompanied by a memorandum stating that they were deposited to secure the repayment of money lent, and containing an engagement to execute, if required, a legal mortgage of the premises. The judgments were obtained several months after the date of the deposit. *Elegits* were sued out, and the Sheriff delivered legal seisin of the premises.

Upon

Upon this the tenants attorned. The Defendants had no notice of the equitable mortgage. The bill prayed, among other things, that the Plaintiffs might be declared to have an equitable mortgage upon the premises, and to be entitled to priority over the elegits and judgments.

1846.

 WHITWORTH
 v.
 GAUGAIN.

By the equitable mortgage the Plaintiffs acquired a special lien upon the property : they might, through the medium of this Court, have compelled a sale of it for the payment of their debt, or they might, by virtue of the engagement for that purpose, have obliged their mortgagor to convert the equitable into a legal mortgage. The Plaintiffs had thus an interest in the premises to the amount of their debt, and just as strong an interest, to use the words of *L. C. B. Richards*, in *Casberd v. The Attorney-General (a)*, as if a mortgage had been executed. What, then, in this case would be the effect of the judgments and the elegits ?

It will be proper to consider the question, first, as it would have stood if the recent Act, 1 & 2 *Vict. c. 110.*, had not been passed, and, secondly, with reference to the provisions of that statute.

A judgment has relation to the time when it is entered up. It will not affect any *bonâ fide* conveyance made for value before that time, for it only attaches upon that which is then, or afterwards becomes, the property of the debtor. But the rule is not confined to that which was his property at law. If it is charged in equity before the entry of the judgment, the judgment will not affect such charge.

It

(a) 6 *Price*, 411.

1846.

WHITWORTH
v.
GAUGAIN.

It can only attach upon the interest which remains in the debtor, *viz.* the legal estate subject to the equitable charge. Upon a judgment obtained against a mere trustee a Court of Equity would never permit the trust property to be applied in satisfaction of the judgment; and for the same reason, if the property is subject to a trust short of its full value, the judgment can only in equity affect that which remains after the trust is satisfied, for this alone is the property of the debtor. In the case put by the Vice-Chancellor of an estate charged with the payment of debts or legacies, the creditor of the owner of the estate so charged would not be allowed to sweep away the whole property, and defeat the claims of the creditors and legatees. Many other similar cases might be stated shewing that, as well in the instance not merely of express trusts, but of trusts in the view of a Court of Equity, the judgment creditor can take only what remains in the trustee after satisfying the trusts with which the property is charged. No substantial distinction can be drawn between cases of this nature and that of an equitable mortgagee whose interest in the property is recognised in a Court of Equity, and is as complete and as sacred as that of the mortgagor. The case of *Burgh v. Francis (a)*, was that of a mortgage in fee, without livery. The mortgagor died. Judgments were obtained against the heir upon the bond debts of the father. Upon a bill filed by the mortgagee, it was decreed that "the heir should make a conveyance to the mortgagee, and that he should hold till redemption discharged of the judgments." Lord *Nottingham* held "the heir to be a trustee of the land descended charged with the equity of the mortgage." The equitable mortgage in that case was preferred to the judgments. So in the *Forum Romanum (b)*, it is said

(a) 3 *Swanst.* 536. n.

(b) P. 228.

said that, "if *A.* takes a mortgage by a defective conveyance, and *B.* afterwards obtains judgment upon a bond debt against the mortgagor, and so extends the mortgaged lands, there a Court of Equity will relieve *A.* and oblige *B.* to supply the defect in the mortgage. For in this case *B.* was only a bond creditor, and his original security was only *in personam*, and therefore when he betters his security by a judgment *in rem*, yet this shall only be a lien upon the land, as it was in possession of the mortgagor or his heir, and that is subject to a mortgage defective at law, but which was good in equity." In the case of *Finch v. the Earl of Winchelsea* (*a*), it was said that "if one contracted to buy an estate and paid his purchase money, and afterwards the person who agreed to sell acknowledged a judgment or statute to a third person who had no notice, yet the judgment should not in equity affect the estate, because, from the time of the articles and payment of the money, the person agreeing to sell would be only a trustee for the intended purchaser;" which was admitted and affirmed by the Lord Chancellor.

1846.

 WHITWORTH
 v.
 GAUGAIN.

If such, then, be the effect of the judgment, how does the *elegit* operate? By stat. 13 *Ed. 1. c. 18.*, "when a debt is recovered, the sheriff shall at the election of the Plaintiff deliver to him all the chattels of the debtor, and a moiety of his land, until the debt be levied by a reasonable extent." The land of which a moiety is to be delivered, is the land that is bound by the judgment. The judgment and the writ are in this respect co-extensive. If this is so in law, it is equally so in equity. The equitable interests which prevail against the judgment, prevail equally against the writ. The land taken will, in the hands of the judgment creditor, be liable to all of the

(*a*) 1 *P. Wms.* 277.

1846.

 WHITWORTH
 v.
 GAUGAIN.

the equities, to which it was subject in the hands of the debtor, as were not bound by the judgment. It would be of no avail to protect equitable interests against a judgment, if they were not also protected against the execution founded upon the judgment. In the case of *Casberd v. the Attorney General* (a), an equitable mortgage was allowed to prevail against an extent at the suit of the Crown. It is true that in that case the Crown was not in possession of the legal estate, and the Chief Baron *Richards* considered that if the legal estate had been in the Crown there would have been a difficulty in doing justice to the Plaintiff, because there are no equities against the Crown. But it is, I think, clear, from the course of the learned Judge's observations, that where the difficulty did not exist, that is, in a case between subject and subject, the possession of the legal estate would, in his judgment, have made no difference, and that the execution creditor would have held the estate subject to the equity, and as a trustee for the equitable mortgagee. In *Prior v. Penpraze* (b), which was the case of a defective conveyance upon a sale by the ancestor of the Defendant, a bill was filed against the heir and another to supply the defect, and to restrain a creditor, who had obtained judgment after the sale, from suing out an *elegit*. The creditor demurred to the bill, but the demurrer was over-ruled by the Court. In the passage from the *Forum Romanum*, to which I have already referred, and where it is said that the Court would give relief, the case put is that of a judgment followed by an execution under which the lands had been actually extended. In these cases the execution creditor, although he obtains the legal estate, holds it subject to all such equities as are not affected by the judgment.

The

(a) 6 *Price*, 411.

(b) 4 *Price*, 99.

The same rule holds in the case of an extent against the goods of a debtor to the Crown; and equitable interests in those goods are respected. Many instances are referred to by *Patteson J.* in delivering his opinion in the House of Lords in the case of *Giles v. Grover*. (a) "It is conceded," he says, "that the Crown cannot avoid an equitable mortgage, or the lien of a factor, or of a wharfinger, or a *bonâ fide* assignment in trust for the benefit of creditors, or any other similar assignment or charge, because they are created when the debtor has legal authority and power to create them, and they attach upon the goods before the interest of the Crown; and the Crown can only take the goods subject to such liabilities as the debtor has legally created."

1846.

 WHITWORTH
 v.
 GAUGAIN.

In the argument on the part of the Defendant, the case was put upon the footing of a purchaser for value without notice, who would be preferred to a prior equitable mortgagee. But a distinction in this respect has always been made between a judgment obtained without notice of a previous charge, and a purchase or mortgage. In the case already mentioned of *Burgh v. Francis*, judgments had been obtained, but they were not allowed to prevail against the Plaintiff's equity. "A purchaser without notice of the trust," Lord *Nottingham* observed, "may be free, but an incumbrance" (speaking of the judgments) "is not like a sale." The learned author of the *Forum Romanum* expresses himself to the same effect. "In the case of a judgment creditor," he says, "the original security was only personal, and a Court of Equity will not suffer the person that originally lent upon the security of land to have the security destroyed by one who did not lend upon

(a) 6 *Bligh*, N. S. 292.

1846.

 WHITWORTH
 v.
 GAUGAIN.

upon that security." This distinction is also taken in the case of *Brace v. The Duchess of Marlborough* (a) in *Taylor v. Wheeler* (b), in *Sir Simeon Stuart's Case* (c) and in many other cases.

The remaining point relates to the recent statute 1 & 2 *Vict. c. 110.*, and to its effect upon this question. The object of the Act was to give to creditors more effectual remedies against the estate of their debtor. Accordingly, in the clause respecting the *elegit*, it enables the sheriff to deliver the whole instead of one moiety of lands of the debtor; and the writ is extended to copyhold lands, and other descriptions of real property not included in the statute 13 *Ed. I. c. 18.* But though the operation of the writ is rendered more extensive against the property of the debtor, it does not appear that the equitable interests in the property taken in execution are affected by the act, or that the law in this respect has been varied. "The sheriff," it is enacted, "may make and deliver execution of the lands &c. therein mentioned, in like manner as he may now do of one moiety of the lands, of any person against whom a writ of *elegit* is sued out." The effect of the execution of the writ upon the equitable interests to which the land may be subject remains the same as before the passing of the Act. The only other clause material to be adverted to is that which relates to judgments. It is enacted, "That a judgment shall operate as a charge upon the property therein described, to which the debtor shall at the time of entering up the judgment, or at any time afterwards, be entitled for any estate or interest whatever at law, or in equity, or over which he shall have an unfettered power of disposing for his own benefit."

(a) 2 *P. Wms.* 491.

(c) Cited 3 *Ves.* 576.

(b) 2 *Vern.* 564.

benefit." It is also enacted, "That the judgment creditor shall have the same remedy in a Court of Equity against the property so charged, as if the charge had been made by an agreement in writing." The effect of this statute is not only to make the judgment attach upon property which was not before bound by it, but also to give it the force of an express charge. With respect to the former provision, although the judgment may affect a greater extent of property belonging to the debtor, there is nothing to vary the rule as to the equities to which the property may be liable. The whole beneficial interest of the debtor is bound, not the beneficial interest which a stranger may have in the property. For by this same clause it is provided that any equitable interest in land to which the debtor may be entitled shall be bound by the judgment, which implies that the judgment shall not bind an equitable interest in another party. The statute treats the legal estate as separate from the equitable interest, and makes each of them subject to the judgments against their respective owners. When, therefore, it is enacted that the judgment shall operate as a charge upon the estate, this must mean a charge upon the beneficial interest of the debtor. If he has a legal estate subject to an equity, it will be a charge upon the estate subject to the same equity; in the case of an equitable estate it will be a charge upon the equitable interest; any other interpretation would put every equitable interest at the mercy of the owner of the legal estate. It does not appear to me, therefore, that the conclusion to which I should have come to in this case, independently of the recent Act, is at all varied by the provisions of that statute.

A similar question, I am informed, came before the Lord Chancellor of *Ireland* (Sir *Edward Sugden*) in the course of last *Trinity* Term, in the case of *Abbott v. Stratten*.

1846.

 WHITWORTH
 v.
 GAUGAIN.

1846.
WHITWORTH
v.
GAUGAIN.

Stratten. The case is not yet published ; but I have note from one of the gentlemen who reports the case in the *Irish* Court of Chancery, in which he says that the Chancellor, in referring to *Whitworth v. Gaugain* said, "I entirely agree with the conclusion to which the Vice-Chancellor (*Wigram*) has come in that case, and I have never myself entertained any doubts upon that point."

The appeal must be dismissed with costs.

1839.

The ATTORNEY-GENERAL v. The Earl of STAMFORD.

THIS was an information filed against the trustees of the Free Grammar school at *Manchester*, and against the Head master and Usher of the same, praying for an account and a reference to the Master of this Court to settle a scheme for the future management of the charity, having regard to its augmented revenues and

By the statutes of a free grammar school founded at *Manchester* in the reign of *Henry VIII.*, it was provided that a high master and usher should be appointed, with certain stipends payable out of the revenue of the charity, who were to teach freely and indifferently any male child who should come to the school from whatever county or shire without any money or other reward whatever, except only the said stipends—one of which scholars was to be appointed by the head master to teach the infant scholars (infantes) their A, B, C, primer and sorts till they began grammar. The surplus income of the charity, when it exceeded a certain sum, which was to be kept as a reserve, was to be applied in exhibitions for the scholars at the Universities of *Oxford* and *Cambridge*. Vacancies in the body of trustees, who were twelve in number, were to be filled up from among honest men of the parish of *Manchester*; and there was a power to the trustees for the time being to augment, expound, and reform all such of the original statutes as concerned the schoolmaster, usher, and scholars. The revenue of the charity having of late years greatly increased, and an information having been filed for a new scheme, it appeared that for upwards of a century past some of the trustees had been elected from adjacent parishes and counties; and that for a like period the two masters had been allowed to take boarders, who had participated indiscriminately with the other scholars in the exhibitions and other benefits of the charity. The trustees had also sanctioned a regulation, by which boys under six years of age, and unable to read, were excluded from the school.

By the decree of Lord Chancellor *Cottenham*, it was referred to the Master to settle a scheme with the following declarations. 1. That in future appointments of trustees regard was to be had to the qualifications required by the statutes. 2. That all boys who were of an age to be capable of receiving instruction were to be admitted. 3. That boarders were not in future to be eligible to exhibitions, or to derive any benefit from the funds of the charity in any manner by which the expenditure of such funds might be increased.

On a rehearing before Lord Chancellor *Lyndhurst*, it was held that there was no ground for excluding boarders from the benefit of the charity. The third declaration was accordingly struck out, and, in lieu of it, a reference directed to the Master to inquire on what conditions, and subject to what restrictions, the masters were to be allowed to receive boarders in their houses.

The Attorney-General ought to be a party to all inquires before the Master, under the 52 G. 3. c. 101. (Sir *S. Romilly's* Act), and any proceedings taken in his absence are irregular.

1839.
 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

and to the altered circumstances of the town, and for the appointment of new trustees in the room of some of the Defendants, who were alleged not to be qualified for the office according to the provisions of the foundation deed.

By that deed, which was a deed of feoffment, bearing date in the 16th Henry VIII., after reciting that *Hugh Oldham*, late Bishop of *Exeter*, “for the good mind which he had and bore to the county of *Lancaster*, considering that bringing up children in learning and good manners was the means to have good people there, and that the liberal science and art of grammar was the ground and foundation of all other liberal arts or sciences, without which the others could not probably be had, for the science of grammar was the gate by which all others were known, in diversity of tongues and speeches; but that, from the great poverty of the common people there, as also for lack of schoolmasters and ushers, the children in the same county, having pregnant wit, had been, for the most part, brought up idly, and not in virtue, learning, education, and good manners,” he, the Lord Bishop, at his own costs and charges, had, within the said town, built a house adjoining to the College of *Manchester*, for a Free School, there to be kept for ever, and to be called the *Manchester* School; and had also, at his own expense, purchased other premises, which he had conveyed, together with the said school-house, to *Hugh Bexwycke* and *Joan Bexwycke* and their heirs, to be disposed and converted to, and for the continuance of, the teaching and learning to be had and taught in the same school: It was witnessed that the said *Hugh* and *Joan* gave and granted the said premises, and also divers others therein described, of which they were seised to their own use, to twelve persons therein named, and their heirs for ever, to the use and intent that they should perform,

perform, fulfil and observe all the acts, ordinances, provisions and constitutions contained in the schedule thereto annexed.

1839.


The
ATTORNEY-
GENERAL

v.
The Earl of
STAMFORD.

By the regulations contained in the schedule, it was, amongst other things, provided that there should be a High master and an Usher for the school, having sufficient literature and learning to teach children grammar after the form and manner then in use in the school of *Banbury* in *Oxfordshire*, or after such use and manner as should thereafter be ordained universally throughout the province of *Canterbury*: the High master and Usher to be appointed by the said *Hugh* and *Joan* during their joint lives, and the life of the survivor, and after the death of the survivor, by the president for the time being of *Corpus Christi College, Oxford*, and in default of appointment by him within one month after a vacancy, then by the Warden of the College of *Manchester*. That every schoolmaster and usher should teach freely and indifferently every child and scholar coming to the school, without any money or other reward whatsoever, except only their stipends, which were to be 10*l.* a year for the High master, and 5*l.* a year for the Usher. That the High master for the time being should always appoint one of his scholars, as he should think best, to instruct and teach, in one end of the school, all infants (infantes), that should come there to learn the A, B, C, Primer and Sorts till they began in grammar, such scholar to be changed every month. That no scholar or infant of whatever county or shire soever, being a male child, should be refused admission to the school, except he had some horrible contagious disease, or other infirmity, to be judged of by the Warden. That every scholar, at his first admission, should pay the sum of 1*d.* towards cleaning the school, and have his name entered in a book, which was, every

1839.

The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

third year, to be delivered to the Warden, "to the intent that it should always appear who had been brought up in the school, and so they to have exhibitions to *Oxford* and *Cambridge* as after provided." The surplus revenue of the charity property, after paying the stipends of the masters, and the other necessary outgoings, was to be accumulated until it reached the sum of 20*l.*, after which the annual surplus was to be given "to the exhibitions of scholars yearly at *Oxford* and *Cambridge*, who had been taught in the school, by the discretion of the Warden and the High master for the time being; but so that no scholar should have yearly above 26*s.* 8*d.*, and *that* till such time as he should have some promotion by fellowship of some College or Hall, or other exhibition, to the amount of seven marks." It was also provided that future vacancies in the number of the trustees should be filled up "from among honest gentlemen and honest persons of the parish of *Manchester*." (a) Lastly, it was provided that, "inasmuch as in time to come many things might survive and grow by sundry occasions and causes, which, at the making of these acts and ordinances, was not possible to call to mind, the trustees, from time to time, when need should require, calling to themselves discreet learned counsel, and men of good literature, should have full power and authority to augment, expound, and reform all such of the said acts and ordinances only concerning the Schoolmaster, Usher, and Scholars, for their and ever the good of their offices concerning the said school for ever."


The charity estates having in the course of the last century greatly improved in value, additions were from time to time made to the salaries of the masters; and two assistant masters were appointed with salaries; and twelve


(a) Some of the original trustees named in the deed were therein described as residents of other parishes and counties.

twelve exhibitions, of 60*l.* each, were founded : notwithstanding which additional outgoings there remained, of late years, a considerable surplus income, which was invested and suffered to accumulate.

In the year 1832, the accumulations then amounting to about 120,000*l.* in the 3 per cents., the trustees obtained an order upon a petition presented under Sir *Samuel Romilly's* Act, by which it was referred to the Master to settle a new scheme for the management of the school, and to inquire whether it would be for the benefit of the charity that any and what addition should be made to its establishment, and, in case any surplus income should remain after providing for instruction in the learned languages, in what manner such surplus should be applied, and whether it would be proper that the school buildings, which were then old and dilapidated, should be rebuilt or repaired, and whether any and what additions should be made thereto.

When that order was obtained the condition of the school and of the charity was this : — The school-house, which was built in 1776 on the site of that mentioned in the foundation deed, consisted of two rooms, the one called the Upper School, in which instructions were given by the High master, Usher, and their two Assistants in the learned languages ; and the other, called the Lower School, to which any boys of six years old and upwards were admitted who could read English, and where they were instructed by another master in English reading and the rudiments of Latin, until they acquired sufficient proficiency to take their place in the Upper School ; the scholars both of the upper and lower schools having the opportunity of receiving instruction in writing, arithmetic, and mathematics, but not gratuitously, such instruction not having been considered to be within the sphere


1839.

 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

1839.

 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

of studies at a Grammar School. The High master, the Usher, and the Assistant masters, whose salaries from the charity were respectively 500*l.*, 250*l.*, 170*l.*, and 135*l.*, had all for many years been permitted by the trustees to take boarders in their houses, who were instructed along with the other scholars, the whole number of scholars of both kinds being about 200. The gross revenue of the charity estates and property was about 4500*l.*, including the dividends of the stock; and the average surplus for the last three years, after paying the salaries of the masters, the exhibitions, of which there were twelve of 60*l.* a year each, and other outgoings, was about 2800*l.*

The scheme which, under these circumstances, was adopted by the Master, and subsequently confirmed by the Court, made provision out of the surplus income of the charity for gratuitous instruction in writing, arithmetic, mathematics, natural philosophy, and modern languages; and also for the gradual formation of a library, and a collection of scientific instruments for the use of the school: and a sum not exceeding 10,000*l.* was allowed out of the accumulated fund for rebuilding the High master's house and the school-house, with such additional rooms as might be required for carrying into effect the more extended system of education then proposed. Sanction was also given to the continuance of the practice, of the High master and Usher and their Assistants taking a limited number of boarders in their respective houses. And it was provided that all boys of the age of six years and upwards should be eligible to become scholars, and should be allowed to remain at the school up to the age of twenty. The salaries of the High master, Usher, and Assistants were slightly increased, provision was made for the awarding of premiums to the scholars for proficiency and good conduct in the school. and the exhibitions were continued at their actual number
 and

and amount ; with certain regulations respecting the annual examination of candidates for them, with a view to secure impartiality in the election ; both the premiums and the exhibitions being open alike to boarders as well as free scholars.

1839.

 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

The present information was filed, on the relation of several residents within the parish of *Manchester*, about two years after the Master's report had been confirmed, and when the High master's house was nearly completed. The ground on which it sought to disturb the scheme so recently sanctioned by the Court was, that the proceedings which had resulted therein had been conducted in the absence of the Attorney-General, who, as it appeared from the Master's report, had not been represented before him ; so that the whole matter had been left in the hands of the trustees, several of whom were noblemen and country gentlemen not resident in the town or parish of *Manchester*, and, for that reason, as the information submitted, not only imperfectly acquainted with the circumstances and wants of the inhabitants, but absolutely disqualified for the office of trustee.

With respect to the merits of the scheme, the information charged that it was neither suited to the wants and character of the inhabitants of *Manchester*, who were for the most part engaged in mercantile pursuits, nor consistent with the expressed object and design of the founders : that what was intended to be a Free Grammar school for the daily instruction in useful learning of the sons of the inhabitants of *Manchester* and its vicinity, of all ranks and classes, had been converted into a scholastic establishment resembling the great public schools in which the system of education was adapted almost exclusively to the wealthier classes : that the practice of taking boarders who paid for their

1839.
 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

education was a breach of the regulation which for the master to take any payment or gratuity from scholars, and that, at all events, boarders were not entitled to enjoy the exhibitions or other benefits of charity, although, in fact, they had enjoyed them much greater proportion than the free scholars: the sum allowed for rebuilding the High master's was excessive, inasmuch as, but for the practice of taking boarders, a much smaller house would have sufficed. It further charged that children under six years of age or who were unable to read, ought not to be excluded from the school, but that, on the contrary, provision ought to be made for the instruction of very young children in the elements of reading by means of alphabet classes, or infant schools, for teaching them their letters in the manner directed by the foundation deed; and having regard to the terms of that instrument, as to the extent and populousness of the district for which the benefit the charity was principally intended, it was proper out of its surplus revenues to endow several schools of that description in different parts of the district.

The Trustees and the Masters, in their answer, relied on long usage, as well as on the construction of the deed, in justification both of the practice of appointing non-residents, as trustees, and of taking boarders; adding that the payments made to that class of scholars were made exclusively for board, and not in any respect for instruction. They also insisted that the proceedings on the petition had been regular, and that this information, so far as it sought to disturb the existing scheme, was irregular. With reference to the proposed system of elementary instruction, they contended that no elementary instruction was within the scope of the charity which was immediately connected with a classical education.

The information came on to be heard before Lord *Cottenham*.

Mr. *Wigram*, Mr. *Anderdon*, and Mr. *Mylne* appeared for the Attorney-General.

Sir *Charles Wetherell*, Mr. *Jacob*, and Mr. *Bagshawe* for the Trustees.

Mr. *Russell* for the two Masters.

1839.

The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

1839.
Nov. 30.
Dec. 2, 3, 4, 5.


The LORD CHANCELLOR (*Cottenham*).

1840.
Nov. 10.

I consider this case as one of very great importance, as it relates to the due application of very large funds to the objects of education in so populous and important a town as *Manchester*.

I find this school specially excepted from the application of the Act of last session (*a*), which extends the powers hitherto exercised by this Court in cases of grammar schools; but, fortunately, there are in this case circumstances and peculiarities which prevent that exception from being so injurious to the town as it otherwise might have been. It is impossible to look at the instrument upon which the establishment of this school is founded, without being satisfied that it was intended to be what is technically called a Grammar School; but there is, fortunately, in these instruments sufficient to relieve it from the operation of those decisions in which this Court has, I think unnecessarily, confined the meaning of that term within the narrowest limits. Later cases, however, have departed from the strictness of those decisions; and in cases in which part of the founder's property has become disposable, from the whole

(*a*) 3 & 4 Vict. c. 77.

1840.

 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.


whole of his objects being satisfied with part of it, the Court seems to have lost sight of the doctrine of *cy-près*, under which it familiarly administers the whole or part of his property, which has become disposable from his objects having failed.

The founders of this charity have made provisions which prove that they considered, what might perhaps have been assumed in some other cases, that there was nothing inconsistent with the object of teaching the learned languages, in giving such preliminary instructions as are necessary to the acquiring a knowledge of those languages.

The statutes of 16 *Henry* 8. provide for the teaching “of all infants that shall come to the school there, A, B, C, Primer and Sorts till they be in grammar;” and they also most wisely provide “because in time to come many things may and shall survive and grow by sundry occasions and causes, which, at the making of these acts and ordinances, was not possible to call to mind, that the feoffees should thereafter, from time to time, when need should require, calling to them discreet learned counsel, and men of good literature, have full power and authority to augment, increase, expound, and reform all the said acts, ordinances, articles, compositions, and agreements only concerning the schoolmaster, ushers, and the scholars for their and every of their offices concerning the said free school for ever.” This power and duty so wisely given this Court may exercise without trespassing upon the doctrine of any of the cases.

These provisions of the statutes, together with the course which has been followed in this charity, and the scheme sanctioned by this Court in 1833, of which no complaint

complaint has been made as being too extensive, and which the Defendants indeed insist ought to be held conclusive and binding, relieve me from the necessity of reviewing the doctrine of some of those authorities in this case. And the beneficial provisions of the Act of last session will probably render it unnecessary in any other.

1840.

 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

What I have to consider is, whether there have been made out upon this information sufficient grounds for this Court to decree all or any of the subjects of relief asked at the bar, *viz.*, 1. to have the accounts taken; 2. To remove the existing trustees; 3. To send a reference to the Master to approve of a new scheme for the application of the income of the charity property.

I am of opinion that no case has been made for a decree to take the accounts. The statutes prescribe the mode in which the receiver's accounts are to be settled, and there is no allegation or proof in support of a case of neglect or error in the performance of that duty. In the absence of such proof I must assume that the parties to whom this duty is assigned, have faithfully performed it: To decree an account under such circumstances would be to expose every charity estate to the expense of a suit whenever any person should for any reason ask for an account in the form of an information.

I am also of opinion that upon the second head I cannot make the decree prayed for. It is true that the statutes direct that the feoffees "to be in future appointed" should be "honest gentlemen and honest persons of the parish of *Manchester*." This direction does not appear to have been followed; but the custom appears to have been to appoint the most eminent and distinguished persons in the neighbourhood to the office of feoffees and trustees; and the charity and the public are much indebted to those who have undertaken

1840.

The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

taken those offices and contributed by their influence to support the efficiency of the charity. Of this description are the present trustees, and of their conduct as such feoffees and trustees no cause of complaint has been established; and I should much have regretted if I had found myself compelled, from any objection to their qualification, to remove them from those offices, feeling that by so doing I should, in all probability, be doing a real injury to the charity.

In *Attorney-General v. Clarendon (a)*, it is evident from the observation of Sir *W. Grant*, although the case before him was that of a corporation, that he would not have thought it incumbent upon the Court in such a case as this to inquire into the eligibility of the trustees. The question, however, is very different where the Court has to prescribe the course to be pursued for the future. The provision of the statutes is distinct upon this subject, and I think it is founded upon good sense; for, however advantageous it may be that the charity should have the protection of the powerful and eminent aristocracy of the county and neighbourhood, there can be no doubt that trustees residing within the parish and personally interested in the welfare of the inhabitants of the town would probably give a more regular and vigilant superintendence to the establishment: perhaps a compound of the two would be the most desirable. But, however that may be, I find a rule laid down by the statutes from which I do not find any reason for departing; but, on the contrary, although at the date of the statutes there may have been some difficulty in finding proper persons to fill these offices within the parish, it is certain that the only difficulty now will be in the selection from amongst the many

(a) 17 *Ves.* 499.

many who possess all the qualifications that can be desired.

The most important subject of the plan for the future management of the charity remains to be considered ; and here the only difficulty exists in the former proceedings in 1833. On the part of the Defendants it was contended that these proceedings ought to be treated as conclusive and as excluding all investigation under the present information, whilst, on the part of the Attorney-General (for I cannot for this purpose consider the relators as parties to the litigation), it was insisted that these proceedings were to be altogether disregarded as *ex parte*. I cannot adopt altogether either of these propositions. That the proceeding was *ex parte* there can be no doubt. The order, the report, and the affidavits upon which the Master made his report clearly prove it. The Attorney-General does not appear to have been a party to the proceedings in the Master's office, which itself, in my opinion, deprives them of the value which would otherwise attach to them. Sir *J. Leach* held that the Attorney-General ought always to be a party to the inquiries under such references. I had hoped that such had since that time been the universal course, and I trust it will be so for the future. If under Sir *S. Romilly's* Act any party may *ex parte* obtain the Master's sanction to any scheme he may propose, and the order confirming the report is to preclude future investigation, that Act will produce much more mischief than, if properly acted upon, it is calculated to do good. The order upon petitions under that Act cannot be obtained without the sanction of the Attorney-General. The law, therefore, requires that he should be a party to the representation to the Court that a grievance exists which the interests of the public require should be redressed : but if he is not to intervene in the inquiry as
to

1840.
The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.


1840.
The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

to the particulars of such grievance, or in the consideration of the proper remedy to be applied, if such inquiry and consideration is to be left to the conduct of parties who may have private interests to promote, not only will no protection be afforded to the public interests, but the apparent sanction of this Court will in many cases be obtained to pre-existing or newly-conceived abuses. If I find that it is the practice in any of the Masters' offices to proceed upon these references in the absence of the Attorney-General, it will be necessary to make a general order to correct such practice. Some cases were referred to in which the provisions of the Act, as to appeals from orders made under it, were discussed. Such cases have no application to an information by the Attorney-General, complaining of a scheme adopted upon a report under this Act in his absence.

But, although I am of opinion that such proceedings cannot be a bar to any well-founded complaint by the Attorney-General on behalf of the public, I do not think it necessary, because I do not think it would be just, or for the interest of the public, that such proceedings should be treated altogether as a nullity. Much money has been expended, and many new interests may have been created under the directions of the order of 1833. These parties, and these interests, the Court is bound, as far as possible, to protect; and although I find in the scheme so adopted by the Court much to object to, yet I find in it much of which I fully approve. The course, therefore, which, I think, this Court ought now to follow, is to adopt so much of that scheme as is worthy of being maintained, and to correct so much of it as now appears open to objection; and the proper way of effecting that object will, I think, be to send it to the Master with certain directions, some of which will be for the purpose of giving to the Attorney-General an opportunity

opportunity of bringing forward such suggestions as the interests of the public in this charity may appear to require, but others of which, applied to subjects now ready for decision, will be declarations of the opinion of the Court upon those points.

1840.


The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

Of these, the most important is that of boarders in the houses of the Head and other Masters. There have been many cases in which this has been discussed and allowed by the Court—whether wisely or not may, as to some of them, be questioned; but there is no doubt as to the principle upon which the Court has in all of them acted, and which alone could have justified the permission granted. In all the cases, the object of the foundation, and the purposes of the trusts to be performed, being the gratuitous education of the objects of the charity, the Court would not have been justified in granting this permission to the masters, except upon the conviction that the purposes of the charity would not be prejudiced by the exercise of the liberty given. In some it has been thought that the purposes of the charity were likely to be advanced by it; as, when the funds of the charity were very small, it has been supposed that, by opening this additional source of revenue to the master, persons might be induced to accept the office who would have declined to perform the duties for the small salaries which the funds of the charity could afford. Such cases can have no application to the present, in which the income in 1833 was 4550*l.*, and the salary awarded to the Head master was 600*l.* per annum; and the salaries of all the masters together were 2050*l.*, whilst the number of boys, including boarders, was 198. It is, I think, impossible upon any principle, or upon any authority, to justify that part of the scheme approved in 1833, which relates to this subject. I find an expenditure of 10,000*l.* of the charity funds sanctioned, of which a considerable part would
not

1840.

The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

not have been required for the purposes of the charity or for any purpose but the accommodation of the boarders in the master's house. If there were no special circumstances in the case of *Rugby School*, as stated by Sir *W. Grant* in the case of *Harrow School* (a), I can only say that I cannot understand upon what principle Lord *Eldon* got over the, in my opinion, well-founded objections of the Master to the expenditure proposed; nor can I reconcile what is stated to have been done in that case with the principles laid down and acted upon by the same learned judge in *Attorney-General v. Cooper*. (b) Of the sum so to be expended 4450*l.* was for rebuilding the master's house, which was to contain accommodation for twenty boarders including various rooms exclusively for their use. Unfortunately this money has been expended, the buildings have been erected, and I am to say what shall be the future rule upon this subject in the application of the funds of a charity of which part is now invested in the buildings so adapted for these purposes. It appears also, that the permission to the masters to take boarders has long existed, and no doubt those who at present exercise the duties of masters accepted those offices in the expectation that such permission would be continued for the future. I am anxious, as far as possible, consistently with the interests of the charity, not to disappoint expectations so naturally excited, or to do an injury to the interests of these gentlemen; but I am, in the first instance, and in preference to all other considerations, bound to guard the interest of the charity from injury, and its funds from misapplication.

Any provisions, therefore, of the scheme adopted in 1833, that may possibly have the effect of applying, in the future, part of the funds of the charity for the benefit of the

(a) 17 *Ves.* 505.(b) 19 *Ves.* 191. 194.

1840.

The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

the boarders in the house of the master, which can now be corrected, must be altered ; and I find several of that description. The boys so boarded in the master's house cannot be considered as in any respect objects of the charity. From the scholars of the charity, the masters are by the statutes prohibited from taking any payment, or any reward, beyond their stipend. The boarders cannot be considered as scholars of the charity for the purpose of participating in its funds, without submitting to all the provisions required by the statutes ; and yet I find, by the scheme of 1833, that the funds of the charity are applied not only in providing premiums for such boarders as well as the free scholars, but that they are also made eligible for exhibitions. The result appears to have been what might have been expected. Of twelve exhibitions, from 1833 to 1836, both inclusive, eight have been given to boarders and four to day scholars, and from 1807 to 1836, fifty-seven to boarders and twenty-eight to day scholars. It was observed that the Head master and the feoffees appoint the two examiners, and that the head master and the warden select from among the boys reported to be qualified, those to whom exhibitions are given. I will not suppose that there has been any partiality in the selection, but the giving premiums and exhibitions to the boarders is not only a misapplication of the charity funds, but the day scholars have not even a fair chance in the competition with strangers for the prizes intended exclusively for themselves. The superior advantages of the boarders, from the constant and comparatively exclusive attention of the masters, must give them acquirements superior to those of the poor day boys.

These misapplications of the charity funds in favour of the boarders are so obvious that I propose making them the subject of a declaration in the decree. But there may be many others. If, for instance, the various
masters

1840.

The
ATTORNEY-
GENERAL.


v.
The Earl of
STAMFORD.

masters now appointed receive out of the charity funds larger payments than they would require if their instructions were confined to the day boys, the excess is a misapplication of the charity funds. This, and any similar cases, must be the subject of inquiry before the Master. I also think that that part of the scheme which excludes from the school all children under six years of age, is inconsistent with the statutes which, in providing for the teaching of all infants who should come to the school to learn their A, B, C, and Primer, clearly intended that the doors should be open to all children capable of any instruction. I must also observe that the statutes point out the proper application of any surplus of the charity income, namely, in exhibitions to scholars who had been brought up at the school; but the scheme of 1833, although it had to dispose of a surplus of 2000*l.* per annum, made no addition to the twelve previously existing exhibitions of 60*l.* each.

Having felt called upon to make these observations upon some of the provisions of the scheme, I am happy in expressing my approbation of the general spirit of the system of instruction proposed. The object of the provisions, in this respect, is to preserve the integrity of the establishment as a grammar school, but to introduce all such other branches of instruction as may be useful to those who seek the benefit of the founder's bounty; and, as the funds are ample for that purpose, the object ought to be so to apply them as to afford to the inhabitants of *Manchester* the means of gratuitous instruction for their children in all branches of learning and information which may be most likely to be beneficial to them, and such I conceive to be the object of the scheme adopted in 1833, and to which, in that respect, no well-founded objection has, I think, been made; but the Attorney-General ought not, I think, to be

be precluded from offering any suggestions for its improvement.

1840.


The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

I propose, therefore, to declare, that in all future appointments of feoffees and trustees, regard should be had to the qualifications required by the statutes; that all children of an age to be capable of instruction are entitled to be admitted into the school; that no part of the funds of the charity are hereafter to be applied towards paying premiums or exhibitions to boys who are, or have been, boarders in the houses of any of the masters, except in continuing to pay exhibitions already granted; and that such boarders are not in future to derive any benefit from the funds of the charity in any manner by which the expenditure of such funds may be increased. And with these declarations refer it to the Master to approve of such alterations in the scheme contained in the Master's Report of 1833 as may be necessary to carry the same into effect, and as the Master shall find to be proper for the purpose of more effectually carrying into effect the object of the charity, regard being had to the present amount and particulars of the property of such charity, and the existing circumstances of the town and neighbourhood of *Manchester*.

The decree having been drawn up in conformity with that judgment, the Trustees presented a petition of rehearing, and the cause now came on to be reheard before Lord Chancellor *Lyndhurst*.

1841
Dec.

Mr. *Bethell* and Mr. *Mylne* appeared for the Attorney-General,

1841.



The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

Sir *Charles Wetherell* and Mr. *Bagshawe* for the Trustees.

Mr. *Russell* for the two Masters.

The argument on this occasion was directed chiefly to the following points : —

1. The jurisdiction of the Court, in this proceeding, to vary the scheme settled upon the petition of 1833.

2. The eligibility of persons, as trustees, who were not resident within the parish.

3. The age at which scholars were to be admissible.

4. The right of boarders, if admitted at all, to participate in the benefit of the charity, and particularly in the exhibitions.

5. The enlargement of the system of education as suggested in the information.


1842.
March.

The LORD CHANCELLOR (*Lyndhurst*), after stating the grounds of his judgment on the first three points, in which he concurred with the decision of Lord *Cottenham*, proceeded as follows : —

The remaining, and certainly, as Lord *Cottenham* stated, by far the most important, consideration with reference to the welfare of the school, is that which relates to the boarders. The practice of taking boarders is allowed after some hesitation by the Court. Neither party quarrels with that part of the decree, and therefore I am not called upon to inquire into it; but there is

is this restriction imposed, and it appears to me to be a most important one, and requiring very serious attention, and much caution, — that the boys who are received into the houses of the masters as boarders are not to be allowed to share in the exhibitions and premiums with the other scholars. Now, the first thing that strikes me is this, that one very great object in sending boys from a distance to be educated in this school, and to become boarders with the masters, must be the advantage of these exhibitions at the universities; and I cannot help thinking that it is — I will not say altogether, but almost — nugatory to allow the masters the privilege of taking boarders, and to refuse to those boarders the privilege of sharing in the exhibitions. I think it would defeat the very object of taking boarders, and that it was almost useless to allow that practice to be continued if this restriction is to be acted on.

In the decree it is provided that this restriction shall not operate upon exhibitions which have already been granted; and one reason why the practice of taking boarders is allowed to be continued is, that it would be unjust to parties who have accepted their office upon an understanding that this privilege was to be continued, to take away such privilege. But that consideration applies equally to the boys who are now in the school. By the decree of Lord *Cottenham*, exhibitions already granted are to be continued. No doubt there are in the school many boys in the situation of boarders, who have gone thither with a view to these exhibitions, who have resided for some years there, and who cannot be transferred with advantage to other schools; and upon the same principle, therefore, upon which boarders are allowed to be taken, — upon the same principle that it would be unjust to

1841.

 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

CASES IN CHANCERY.

considering the expectations of those persons who had
received their education with a view to this system
it would be also unjust to those boys who have entered
the school with a view to these advantages to deprive
them of the benefits which result from their being placed
in the establishment.

It seems in the argument to have been considered
that the boarders could not be regarded as objects of
the charity, because they paid money to the respective
Masters, contrary to the prohibition in the instrument of
foundation. It appears doubtful upon the fact, whether
this was paid with respect to any of the masters
that were the subject of instruction in the school.
But, without relying upon this, these payments were
authorised by the Court, which follows from the sanction
given to the establishment of boarders; and it cannot be
said to be inconsistent with the rules of the foundation;
the feoffees, and, of course, the Court being author-
ised by an express clause at any time to alter the
rules.

As the school, therefore, was, by the deed of founda-
tion, open to boys from all counties, and who would
of course, be entitled, as members of the school, to sit
in the exhibitions, I do not perceive how a payment to
the Master, under the sanction of the Court, can justify
depriving them of this right. And the same observation
applies equally to the antecedent period; since the
payments were during more than a hundred years made
with the knowledge and, of course, under the sanction
of the feoffees, who, as I before stated, had a power
under the deed to make any variation in this respect
from the original regulations.

I cannot

I cannot, therefore, help coming to the conclusion, that the boarders are objects of the charity, and, therefore, entitled to share in the exhibitions and premiums.

1841.


The
ATTORNEY-
GENERAL

v.
The Earl of
STAMFORD.

If I thought, on looking at the evidence, that this led to any abuse; if there was any thing to satisfy me that the boarders in the houses of the Masters were considered with any peculiar favour in the elections for these exhibitions and premiums, I should then consider it the duty of the Court to interpose. But, from the manner in which the elections are conducted, and advertng to the evidence, with one single exception to which I shall presently direct my attention, there does not appear to me to be any ground for suspecting that in the choice that is made from the whole body of scholars who are candidates for these exhibitions, any partiality is shown towards those who are boarders in the houses of the Masters. It is true that, if you look to the number of boys who have received exhibitions, the proportion of boarders is much larger than of day scholars; and it is inferred, from that circumstance, that some abuse exists in the selection. But it appears to me, that that observation is altogether inconclusive, for many reasons. Undoubtedly the proportion is much larger, and any body who reflected upon it beforehand would be satisfied that it must be so, for reasons which are quite obvious. In the first place, boys coming from a distance would in all probability be better prepared, because they are sent generally with a view to the universities and the learned professions: and earlier in life, therefore, their attention would be directed to subjects which are principally cultivated in schools of this description. In the next place, boys who are intended for the learned professions would stay longer at the school, and for that reason would be much better prepared to be candidates for the exhibitions. In the third place, it is obvious

3 E 3

that,



1841.


The
ATTORNEY-
GENERAL
v.
The Earl of
STAMFORD.

that, in a town like *Manchester*, the great majority of persons would send their sons to this school, with a view to their obtaining such general education as might fit them for being afterwards employed in trade, manufactures, and commerce, and without any idea of sending them to the universities. No doubt a large proportion of the scholars enter the school without any such object. It is, therefore, clear that you cannot, at the first view, come to any conclusion whatever from the number of exhibitions given to boarders being greater in proportion than the number given to day scholars.

Still, however, the question is one of so much importance, that I do not think I ought to decide it at once upon the information already before me. I propose, therefore, at present, to omit that part of the declaration in the decree which relates to exhibitions, and to refer it to the Master to inquire under what restrictions, and subject to what limitations, the High master and undermaster should be allowed to receive boarders in the houses. By that means I shall be enabled, when the cause comes back, to decide whether it is proper to impose any such restriction, as that which my learned predecessor has in the first instance imposed, with respect to this part of the case.

There are many persons who seem disposed to consider that, in a place like *Manchester*, the character of this school ought to be entirely changed, and that it ought to be devoted exclusively to commercial purposes. I should very much lament such a change, because the tendency of different pursuits is to form men into classes, and it is, therefore, I think, of the utmost importance for the purpose of obviating that great inconvenience, that we should, as far as possible, all of us be brought up according to one general system of education; and

no system of education is better for the purposes of refining and humanizing the manners of a nation than a system of literature founded upon classical learning.

1841.

 The
 ATTORNEY-
 GENERAL
 v.
 The Earl of
 STAMFORD.

There is another consideration, also, connected with these establishments, that they are the avenues by which the humbler classes, by industry, activity, and intelligence, can force their way into the highest situations of the state; and by furnishing the means of uniting at an early age the upper and lower classes, they tend to bind together by the strongest ties the whole system of society. For this reason I should regret any substantial change being made in the system upon which this institution is at present conducted.

Therefore the only alteration that I shall make, and which I consider absolutely necessary to make in this instance, is, to omit for the present, at least, the declaration relative to exhibitions, and to direct such reference to the Master upon that subject as I have mentioned.

1840.

March 11.

ATTORNEY-GENERAL v. BOVILL and Others. (a)

Semble. A decree, containing a declaration as to the proper mode of applying the income of a charity estate with reference to the founder's deed, need not be reheard, in order to enable the Court, on the hearing of a subsequent information, to make a different prospective declaration in reference to the same question.

Observations on the doctrine of limiting the participants in a fund devoted to the poor of a parish, to those who are not in receipt of parochial relief.

Semble. A sounder rule

is to administer the charity according to the ordinary rule, and leave to chance to what extent it may operate to the relief of the poor rate.

The order of reference to approve of a scheme, in such a case, contained a special authority to the Master to include provisions for educating, clothing, and apprenticing the children of the poor, advancing sums by way of loan, &c.


Sketch of scheme pursuant to such order.

BY an indenture of feoffment, dated the 28th of February 1552, William Breton, in consideration of 160*l.* paid to him by the churchwardens of the parish of *St. Clement Danes*, enfeoffed and confirmed unto and to the use of *John Browne* and eleven other parishioners and inhabitants of the said parish, and their heirs, his twelve messuages with the appurtenances and his close and void piece of ground with the appurtenances, and his cottage and tenement, called the Slaughter-house, situate near the said twelve messuages, to the intent that they should yearly "pay the same" to the churchwardens of the said parish for the time being, to be distributed in alms by the churchwardens amongst twelve poor people in the said parish for the time being abiding and inhabiting, and who within the same parish by the space of twelve years had been abiding and inhabiting in honest fame and opinion every week or every month, as it should seem best in that behalf, by the discretion, consent, and oversight of twelve

(a) A report of this case (which was decided by Lord Cottenham C. before the present Reporter entered upon his duties in that capacity), having been frequently called for by the Profession, the present note of it


has been prepared after communication with one of the Counsel engaged in it, and with the assistance of the short-hand writer's notes of what passed at the hearing.

twelve honest, good, and discreet parishioners, who had formerly borne the office of churchwarden of the said parish, and by the consent of the greater number of them: and to the intent that whenever all the said feoffees but four or three should be dead, the survivors, at the request of the churchwardens, or of twelve parishioners having formerly filled the office of churchwarden, should make a like feoffment of the trust premises to twelve or ten other persons, good, honest, and discreet parishioners, to hold to them and their heirs to the same intents and purposes, and with the like clauses in the same deed to be contained, as were specified and contained in the now stating indenture.

1840.

 The
 ATTORNEY-
 GENERAL.
 v.
 BOVILL.

For some time after the founding of the charity the income of it was not more than sufficient for the relief of twelve poor persons; but in the course of the seventeenth century, both the number of the poor in the parish and the income of the charity estate having greatly increased, certain almshouses were erected out of the funds for twelve poor women, and the benefit of the charity was extended to the poor of the parish at large.

By a decree of the Commissioners of Charitable uses, dated the 7th of *February* 1701, after reciting that the Commissioners were fully satisfied that the true meaning of the deed of feoffment was, that the whole of the rents and profits should be laid out and disposed of amongst the poor of the parish, and to no other use whatever, it was decreed, to the intent that all future misapplications might be prevented, and that the charity revenues might be rightly applied for the poor of the parish, and that the number of poor to be relieved therewith might from twelve be enlarged to as many as the rents and profits would annually relieve, that the trustees

1840.

 The
 ATTORNEY-
 GENERAL
 v.
 BOVILL.

tees for the time being should pay the rents and profits to the churchwardens of the parish, to be distributed in alms every week or every month to and amongst such poor people, of honest fame and opinion and who had resided twelve years in the parish, as by the said trustees, and ten or twelve other of the most substantial inhabitants should be appointed to receive the same, and that the churchwardens should yearly or oftener account to the trustees, as therein mentioned, for their receipts and disbursements in respect of such charity.

Between the date of that decree and the year 1814 several deeds were executed for the appointment of new trustees, by some or one of which deeds certain trusts were declared at variance with the terms of the original deed of feoffment, it being by such trusts directed that, after providing for the support of the almswomen, the trustees should account for and pay over the residue of the income to the parish vestry, to be applied to the public use and benefit of the parish, either in repairing the church, or in such other uses as occasion might require.

In the year 1814, there being a sum of about 8000*l.* in the hands of the trustees, arising from accumulations of the rents of the estate, part of which it was proposed to apply to the repair of the parish church, an information was filed by the Attorney-General at the relation of certain of the parishioners for the purpose of obtaining the sanction of the Court to such appropriation. That information came on to be heard before Sir *William Grant*, M. R., when a decree was made, dated the 6th *February* 1816, by which it was declared that the rents of the estate ought to be laid out and disposed of amongst the poor of the parish, and to no other use, according to the decree of the Commis-

sioners


sioners of Charitable uses, dated the 7th *February* 1701, and that the trusts contained in the last mentioned deeds, being contrary to that decree, were therefore null and void; and it was ordered that, after paying to the churchwardens as much of the rents and profits of the estate as should be sufficient for the support of the twelve almswomen, and for keeping the almshouses in repair, the trustees should pay the surplus of such rents to the overseers of the poor of the parish, to be by them applied to the use of the poor of the said parish: and, after providing for the payment of the costs of the suit out of certain sums of stock which were standing to the credit of the cause, amounting to about 10,000*l.*, it was ordered, “by consent,” that a sum of 4000*l.*, part thereof, should be paid to the then churchwardens, to be by them applied in discharge of the necessary expenses of repairing the church, excepting the chancel. And it was ordered that the residue of the said sums of stock should be paid to the overseers of the poor of the parish, or any two of them, to be by them applied for the relief of the poor of the parish.

From the date of that decree the sum of 1000*l.* out of a gross revenue of about 3500*l.* was yearly applied in support of the almshouses, and the rest was paid to the overseers of the poor, by whom it was carried to the general account of the poor rate.

In the year 1837 this information was filed on the certificate of the Charity Commissioners, against the churchwardens and the overseers of the parish, insisting that such application of the sums so paid to the overseers was at variance not only with the trusts of the deed of feoffment, but with the true intent and meaning of the decree of 1816, being, in effect, an appropriation of the funds, not for the benefit of the poor,

1840.

The
ATTORNEY-
GENERAL
v.
BOVILL.

1840.

 The
 ATTORNEY-
 GENERAL
 v.
 BOVILL.

poor, but for the relief of those who were liable to the poor rate; and praying that such abuse might be corrected, and that a scheme might be settled for the future management of the charity, and for the distribution of the income among the poor of the parish. The information related also to other charities in the same parish, which had been similarly dealt with.

On the hearing of the cause before the Master of the Rolls, his Lordship dismissed the information as to the property comprised in the decree of the 6th *February* 1816, considering himself precluded, by the terms of that decree, from giving directions as to the application of the income of that property.

Against that part of the decree the Attorney-General appealed. The appeal came on to be heard before Lord Chancellor Cottenham.

Mr. *Richards* and Mr. *Blunt*, for the Attorney-General.


Mr. *Wigram* and Mr. *Sharpe*, for the Defendants.

The first question was, whether the Court could direct a scheme, or otherwise interfere with the present mode of administering the charity, without rehearing the decree of 1816, it being contended, on the part of the Respondents, that the application of the funds now complained of was in conformity with that decree.

Upon that question,

The LORD CHANCELLOR said, I cannot concur in the opinion that I am precluded by the decree of 1816 from doing any thing that may now be proper to be done for the due regulation of this charity. And I am
 also

also of opinion that that decree, even if I were bound by it, does not contain any thing which would preclude me, because when I find the Master of the Rolls in 1816 declaring that the rights of those who were entitled to the benefit of the charity were to be regulated by the decree of 1701, and afterwards directing the surplus to be paid to the overseers, I must consider his intention to have been that it was to be so paid for the purpose of being applied according to the right which was previously declared. The reason for transferring the distribution from the churchwardens to the overseers was probably that the churchwardens had abused the trust. The difficulty is that which has occurred in other cases, how to regulate the application of the money so as not to relieve the poor rates. I think there must be a scheme.

1840.

 The
 ATTORNEY-
 GENERAL
 v.
 BOVILL.


A question then arose whether any, and what, declaration should now be made for the guidance of the Master in settling the scheme; it being contended, on the part of the Attorney-General, that the matter should go to the Master unfettered by any declaration except that which had been sanctioned by previous decisions (a) of the Court in other cases,—viz. that the benefit of the charity should be confined to those inhabitants of the parish who should not be receiving parochial relief; and it was also suggested that the condition of twelve years' residence in the parish should be adhered to, inasmuch as, although not required by the decree of 1701 (b), it might be a means of preventing the mischief,

(a) *Attorney-General v. Price*, 3 *Atk.* 108.; *Attorney-General v. Clarke*, *Amb.* 422.; *Grieves v. Case*, 4 *B. C. C.* 67.; *Attorney-General v. Ward*, 3 *Ves.* 327.; *Bishop of Hereford v. Adams*, 7 *Ves.* 324.; *Attorney-*

General v. Corporation of Exeter, 2 *Russ.* 45., 3 *Russ.* 395.

(b) This representation appears to have been made at the bar, but, it should seem, erroneously.

1840.


The
ATTORNEY-
GENERAL

v.
BOVILL.

chief, which might otherwise arise, of poor persons coming to settle in the parish for the sole purpose of enjoying the charity.

In the course of the discussion,


The LORD CHANCELLOR said—I am a good deal fettered by the decisions which have taken place with respect to persons receiving parochial relief not being proper objects. If I had not those decisions to contend with, it appears to me, with respect to this particular case, that the course would be to select proper objects for this charity without regard to whether it would operate to the relief of the poor rates or not; for, either directly or indirectly, it must so operate, in whatever manner the funds may be applied. I am inclined to think that the right course is between the two that have been suggested—not to make the poor rate the fund to receive but to administer the charity, and to leave to chance to what extent it may operate to the relief of the poor rates.

As to the twelve years' residence, it is, no doubt, one of the conditions in the deed of 1552, but it is not in the decree of 1701; and it does not appear to me that there is any reason why I should be anxious to restore that.

By the decree ultimately made, it was declared that no part of the income of the charity was applicable or ought to be carried, to the account of the poor rates of the parish; and it was referred to the Master to approve of and settle a proper scheme for the application and distribution of the income of the charity, regard being had to the indenture of the 28th February


1552

1552, and to the decree of the 7th *February* 1701, and to the declaration aforesaid; and, in settling such scheme, he was to be at liberty to include therein, if he should see fit, a provision for the education of the children of the poor residing in the said parish, either by aiding the existing schools of the said parish, or by the establishment of new schools there, or for both such purposes, and for the clothing and apprenticeship of such number of the children of the poor residing in the said parish as he might think right; and also a provision for the distribution, by way of loan, of such part of the income as he might think right, to poor persons residing in the said parish; and he was also to ascertain and report, whether any, and what increase ought to be made to the sums then payable to the persons residing in the almshouses; and he was to approve of a scheme for the appointment and keeping up of a sufficient number of substantial householders as trustees for carrying into effect such scheme as he might approve of.

1840.

 The
 ATTORNEY-
 GENERAL
 v.
 BOVILL.

The scheme as settled, and afterwards sanctioned by the Court, provided for the application of the funds and income of the charity to the following purposes, subject to certain conditions and regulations respectively—300*l.* per annum out of the income towards the support of the parochial charity schools. A sum not exceeding 800*l.* out of the funds, if necessary, for the enlargement of such schools. A sum not exceeding 1500*l.*, out of the same funds, for the erection of infant schools, to be open to the children of all the poor inhabitants of the parish, between the ages of two and seven: and a sum of 400*l.*, from the income, for the support of such schools. Such sum as the Master should approve for the purchase of a site for, and the establishment of, a commercial

1840.


The
ATTORNEY-
GENERAL
v.
BOVILL.

cial school, for the children of the same class, subject to the payment by each child of 15s. every quarter. And the sum of 600*l.* per annum, out of the income, for the support of such school. The sum of 200*l.* per annum for apprenticing children of poor households in the parish. Certain sums, amounting together 700*l.* per annum, out of the income, as annual donations to several hospitals and societies for the relief of the sick in the parish, with liberty to the managers to withdraw such donations, or any of them, and apply the same to some other of the charitable objects then provided for. The stipends of the inmates of the existing almshouses to be increased to 30*l.* Such sums as the Master should approve for the purchase of a site for, and the erection of, forty new almshouses in lieu of the existing ones, for the reception of forty poor persons, twenty men and twenty women, subject to certain qualifications as to previous residence and payment of rates in the parish. If any surplus of the income should remain after answering the purposes before-mentioned, such surplus was to accumulate at compound interest, for the purpose of creating a reserved fund of 8000*l.* to answer extraordinary contingencies, and subject thereto, and to keeping up the fund from time to time when reduced by expenses frayed out of it, the surplus was to be applied, to the extent of not more than 210*l.* in any one year, in the payment of premiums of from 10*l.* to 15*l.*, to persons not in the receipt of parochial relief, and eligible for the almshouses, but not being inmates thereof.

1846.

SHARP v. DAY and Others.

May 26.
Dec.

THIS was an appeal from an order of Vice-Chancellor *Knight Bruce*, overruling a general demurrer to the bill.

A member of the provisional committee of an abandoned railway scheme, against whom an action had been brought by a creditor who was alleged to be also a member of the committee, filed a bill on behalf of himself and all other persons interested as partners in the Company, except the Defendants, (who consisted of the Plaintiff in the action and nine other members of the committee) stating that no shares had ever been allotted, but that various

The bill stated that the Defendant *Day*, having in conjunction with several other persons proposed to form a partnership or Company for making a railway, to be called the *East Riding Junction Railway*, issued a prospectus on the 1st of *October* 1845, in which the names of himself and the other Defendants, who were ten in number, together with other persons to the number of thirty-six, were published as forming the provisional committee, and stating that the capital would consist of 350,000*l.* in 17,500 shares of 20*l.* each, on which a deposit of 2*l.* 2*s.* was to be paid, and that the subscribers would be held liable only to the extent of the first deposit, until an Act of Parliament should be obtained, and afterwards only to the amount of their subscriptions; and subjoining the usual form of application for shares. That, shortly after, the Plaintiff was applied to by the Defendant *Day* to become a partner in the Company, and a member of the provisional committee, and

that,

sums had been contributed by several members of the committee, whose names the Plaintiff did not know, pursuant to a resolution of their board, in trust for the liquidation of the liabilities of the company, and that the Defendants had received those sums and also other property of the company, and were misapplying them; and praying that the same might be properly applied in discharge of the liabilities of the company, the Plaintiff being willing to pay his due proportion, and that the outstanding property of the company might be got in and that the action might be restrained. Held (reversing the decision below), that as the alleged contributions appeared to be purely voluntary the Plaintiff had no right to interfere with or ask any relief in respect of them, at all events in the absence of the parties by whom they had been made; and a demurrer for want of parties was on that ground allowed.

1846.

SHARP

v.

DAY

that, relying on the statement contained in the prospectus, and on the Defendants being and continuing to be such partners, he agreed to do so, and his name was accordingly advertized as one of such provisional committee. That about the same time, *Day* undertook to act as temporary secretary to the Company without salary. That applications were made by many persons for shares, but that no shares had yet been allotted either to such applicants or to the Plaintiff, or the other members of the provisional committee.

That several meetings of the committee were held, at which the Plaintiff attended, and plans and sections were made, and some other works done for the purpose of carrying the project into effect: but that at a meeting of the committee held on the 8th of *December* 1845, it was resolved by a majority that the scheme should be abandoned, and that the expenses which had then been incurred should be ascertained, and the amount of them paid by contributions among the members of the committee, and that 10% should be immediately paid by each member as a first instalment, and the Defendants, other than *Day*, were appointed as an audit committee, to take the accounts. That certain sums of money were accordingly paid pursuant to, and for the purposes of, those resolutions, to or for the use of the Defendants in trust for and towards the liquidation of the liabilities of the company.

That on the 30th of *December*, another meeting of the provisional committee was held (but at which the Plaintiff was not present), at which the audit committee made their report, when it appearing that the liabilities of the Company amounted to 1545%, it was resolved that each member of the provisional committee should be called upon to pay his quota 30% into a certain bank
to

to the account of the Defendants, who were authorized to discharge thereout the bills passed by the audit committee. That at the time when that resolution was passed, there were eighty-three members of the provisional committee, the amount of whose contributions at 30*l.* a-piece would be 2490*l.*, and therefore more than sufficient to pay the sum of 1545*l.*, which was the total amount of the debts and liabilities of the company.

1846.

SHARP .
v.
DAY.

The bill then stated, that, in pursuance of the said several resolutions, divers sums of money had been paid to, and for the use of, the Defendants in trust for discharging the said debts and liabilities; and that the Defendants had possessed themselves of other property of the company applicable to the discharge of the liabilities thereof, and that they had discharged thereout all such liabilities except the sum of 220*l.* alleged to be due to the solicitor of the company, and 45*l.* claimed by *Day* to be due to him for his expenses as secretary: but that they had a residue of trust monies in their hands more than sufficient for the discharge of both those claims.

That, under those circumstances, the Plaintiff had refused to pay the 30*l.* mentioned in the resolution of the 31st of *December*, but that he was, and had always been, ready to pay his fair proportion in discharge of the liabilities of the Company, and that he had requested the Defendants to apply the monies now in their hands in payment of the remainder of such liabilities, and to ascertain what was the sum fairly payable by him as his contribution towards reimbursing the parties by whom those monies had been advanced, and to inform him of the names and addresses of such persons, and to whom his contribution ought to be paid: but that they had refused to comply with such request, and that in consequence of the Plaintiff's refusal to pay

1846.

SHARP

v.

DAY.

the 30%, the Defendant *Day* had, in concert with, and at the instigation of, the other Defendants, brought an action against the Plaintiff for his said demand of 45%, in which action he had recovered a verdict for that amount, with leave to the Plaintiff to move to enter a nonsuit.

The bill then charged that *Day* had, notwithstanding his undertaking the office of secretary, never ceased to be a member of the provisional committee, and that the amount of his demand, as secretary, if due at all, was due not from the Plaintiff individually, but from the Company collectively, and was payable out of the monies so as aforesaid in the hands of the Defendants, and that, in fact, his bill was one of those which had been passed by the audit committee, and that the other Defendants had made themselves responsible for the payment of it, and had set apart a portion of the trust monies in his hands to provide for it, and also for the costs of the action in case it should fail.

The bill further charged, that the Defendants had wasted and misapplied the monies so paid and held as aforesaid in trust for payment of the liabilities of the Company, and that they intended further to misapply them in payment of gratuities to the engineer of the Company, and in other ways. That the members of the provisional committee were eighty-three in number or more, and that there were many persons other than the Plaintiff and the Defendants who were partners in the company, but that the Plaintiff was unable to set forth who such persons were, and that if known, they were too numerous to be conveniently made parties to the suit: but that, so far as they or either of them had any interest in the matters therein mentioned, or in the relief thereby prayed, their interests were the same as the Plaintiff's.

The

CASES IN THE COURT

to the account of the Defendant, and to discharge the same. That at the meeting of the committee. That at the meeting of the committee passed, there were appointed a special committee, the members of which were at 30/- a-piece, which was more than sufficient to pay the total amount of the debt.

The bill then stated that several resolutions, directed to, and for the use of the Defendant, charging the said Defendant with the Defendants had possession of the company's property, and the liabilities thereof, and that all such liabilities were due to the solicitor by Day to be due to them but that they had in their hands more than sufficient claims.

That, under these circumstances, the Defendant refused to pay the sum of the 31st of December, and had been, ready to pay the same, the liabilities of the Defendant, requested the Defendant to put their hands in payment of the same.



the
rs
ant
the
arties
to

1846.

SHARP

v.
DAY.

to the suit, and that, at all events, those who stated to have contributed ought to be so.

On the hearing of the appeal.

Mr. Bethell and Mr. Follett, appeared for the appellants.

Mr. Parry and Mr. Kenyon, for the Respondent.

For the Appellants it was argued, that though the spoke throughout of a partnership or Company, it not state a case of actual partnership, but merel proceedings preliminary to the formation of one, that in that state of things there was no common bility for the expenses incurred in promoting the dertaking, either between the intended shareholder such, *Fox v. Clifton* (a), *Wood v. Duke of Argyle* or between the members of the provisional commit for that the mere circumstance of the names of ce persons being associated together in advertisement forming that body (which was the only thing sugge by the bill as connecting these parties together) did establish such a privity between them as would er any one or more to file a bill against the rest for tribution ; and that at all events a bill for that pur could not be sustained without bringing all the pa liable to contribute, individually before the C *Hichens v. Congreve* (c), *Richardson v. Hastings* If it should be said that this was not a bill for contri tion, but for administration of a trust fund, the an was, that although the bill stated that the sums tributed had been received by the Defendants in


(a) 6 Bing. 776.

(b) 6 Man. & Gr. 928.

(c) 4 Russ. 562.

(d) 7 Beav. 301.

sioners of Charitable uses, dated the 7th *February* 1701, and that the trusts contained in the last mentioned deeds, being contrary to that decree, were therefore null and void; and it was ordered that, after paying to the churchwardens as much of the rents and profits of the estate as should be sufficient for the support of the twelve almswomen, and for keeping the almshouses in repair, the trustees should pay the surplus of such rents to the overseers of the poor of the parish, to be by them applied to the use of the poor of the said parish: and, after providing for the payment of the costs of the suit out of certain sums of stock which were standing to the credit of the cause, amounting to about 10,000*l.*, it was ordered, “by consent,” that a sum of 4000*l.*, part thereof, should be paid to the then churchwardens, to be by them applied in discharge of the necessary expenses of repairing the church, excepting the chancel. And it was ordered that the residue of the said sums of stock should be paid to the overseers of the poor of the parish, or any two of them, to be by them applied for the relief of the poor of the parish.

1840.

 The
 ATTORNEY-
 GENERAL
 v.
 BOVILL.

From the date of that decree the sum of 1000*l.* out of a gross revenue of about 3500*l.* was yearly applied in support of the almshouses, and the rest was paid to the overseers of the poor, by whom it was carried to the general account of the poor rate.

In the year 1837 this information was filed on the certificate of the Charity Commissioners, against the churchwardens and the overseers of the parish, insisting that such application of the sums so paid to the overseers was at variance not only with the trusts of the deed of feoffment, but with the true intent and meaning of the decree of 1816, being, in effect, an appropriation of the funds, not for the benefit of the poor,

1846.


 SHARP
v.
DAY.

He complains of the intended misapplication of the money, and prays various matters respecting it. I cannot understand, however, by what right he claims to represent the subscribers to this fund, or to unite himself with them in a suit respecting it. The subscription was purely voluntary. The money was voted and paid upon the faith that all would contribute their proportion. This the Plaintiff declined doing. He can have no right, therefore, to interfere with the fund, or to direct or control its application. It belongs exclusively to the subscribers, and if he wishes to enforce any supposed claim with respect to it, he cannot, I conceive, do this by representing or uniting himself with them, but must proceed adversely against them, and in such a manner as to give them an opportunity of properly defending their rights. The Plaintiff is seeking to free himself from liability at their expense, that is, out of a fund which belongs solely to them. A principal object of the bill is to restrain further proceedings in the action at law brought by *Day*. The subscribers have no interest in obtaining this injunction, still less have they an interest in applying a fund exclusively theirs in discharge of the action.

I think, therefore, the record is improperly framed in respect to the parties, and that the demurrer ought to be allowed. But I shall give the Plaintiff leave to amend. (*a*)

(*a*) See the two next cases.

July.

MEMORANDUM.

Lord *Lyndhurst* resigned the Great Seal, which was again delivered by Her Majesty to Lord *Cottenham*, as Lord Chancellor, and his Lordship accordingly resumed his seat in *Lincoln's* Inn Hall on the 7th *July* 1846.

1847.

APPERLY v. PAGE.

April 13. 16.

THIS was an appeal from an order of Vice-Chancellor *Knight Bruce*, overruling a general demurrer to a bill filed against the Provisional Directors of a Railway Company by five shareholders, on behalf of themselves and all the rest except the Defendants.

The bill represented that the scheme originally announced by the prospectus was, at first, one of great promise, and that the Defendants had applications made to them by substantial parties for shares exceeding the number which would have been sufficient for raising the whole amount of capital required for the undertaking; but that by negligence and misconduct they omitted to take advantage of such applications, and that before the end of *October 1825*, they had ascertained, as the fact was, that the required amount of capital could not be raised, and that the scheme had become abortive and impracticable;

A bill may be filed against the directors of a provisionally registered railway company, after its dissolution, by some of the shareholders on behalf of all, except those Defendants, for the winding up of its affairs, though the bill prays not only the collection of the joint property and its application in discharge of the joint liabilities, but also the distribution of

the surplus among the shareholders in proportion to the amount of their respective subscriptions.

In a bill filed against the directors of a provisionally registered railway company by some of the shareholders, on behalf of all except the Defendants, for the winding up of its affairs, after stating that a certain number of persons had executed the parliamentary contract as subscribers for certain shares, but that they had not paid their deposits, and that no shares or certificates of shares had been issued to them, it was alleged that the Plaintiffs were ignorant of their names and addresses. Held, on demurrer for want of parties, that that allegation was a sufficient excuse for not making those persons Defendants, although the Standing Orders required that a copy of the parliamentary contract containing the names and addresses of all persons who had executed it, should be deposited in the Private Bill Office, and it appeared from statements in the bill that that document had been deposited pursuant to the Standing Orders, and that the Plaintiffs had procured a copy of it.

Where a bill by certain persons, on behalf of themselves and others, for relief against an alleged breach of trust, is demurred to, on the ground that some of the parties, on whose behalf the Plaintiffs profess to sue, appear to have been implicated in the transaction complained of, the proper test of such objection is to see whether the bill states facts with respect to those parties, which, as against them, would amount to a defence to the suit.

1847.

APPERLY
v.
PAGE.

ticable; but that they concealed that fact from the Plaintiffs and the other shareholders; and having induced them to execute the Subscribers' agreement and Parliamentary contract in the belief that a proper allotment of shares had been made, to the full amount required for raising the proposed capital, they caused surveys to be made, and incurred other expenses to a large amount in further prosecution of the scheme; and that, availing themselves of a power which they had caused to be introduced into the Subscribers' agreement, unknown to the Plaintiffs, at variance with the terms of the original prospectus, authorising them to limit the scheme to a portion of the line originally proposed, they applied to Parliament in the ensuing Session for an Act to enable them to make such shorter line; but not having obtained subscriptions to the amount of a sufficient proportion of the capital required, even for that line, to satisfy the Standing Orders of the houses of Parliament, they caused and procured the Parliamentary contract to be signed by divers persons to the extent, nominally, of 955 additional shares, but which shares were wholly fictitious, no certificates having been issued or deposits paid upon them; and that, previously to a meeting of the shareholders, convened in the month of *May* 1845, pursuant to certain resolutions of the House of Commons, for the purpose of enabling the shareholders to determine by a majority of votes whether the same should or should not be proceeded with, the Defendants, in order to enable them to obtain an authority to proceed with their bill in Parliament, had purchased, or procured to be purchased for small sums of money a large number of scrip certificates of shares in the Company, which enabled them at the meeting to carry a resolution in favour of proceeding with the bill. That the result, however, was that

that the bill, after having passed the House of Commons, was rejected by the House of Lords; so that, as the subscribers' deed only authorised an application to Parliament in that session, the scheme was completely frustrated and at an end.

1847.

 APPERLY
 v.
 PAGE.

The bill charged that the names of the persons who so nominally subscribed the Parliamentary contract were unknown to the Plaintiffs, and that they were unable to ascertain them; but that they were known to the Defendants, who refused to discover them. In another passage, however, the bill noticed the fact of the Plaintiffs having procured, from the Private Bill Office of the House of Commons, a copy of the Parliamentary contract which had been deposited there by the Defendants, agreeably to the Standing Orders in that behalf, on the occasion of their applying for their Act.

It then charged that the number of the shareholders in the Company was so great, and their rights and liabilities so subject to change by death and otherwise, that it would not be possible, without the greatest inconvenience, to make them parties to the suit, and so to do would render it impossible to bring the suit to a termination; but that the interests of all the shareholders, except the Defendants, were identical with those of the Plaintiffs, and that none of the shareholders, except the Defendants, had interests adverse to, or differing from those of the Plaintiffs in respect of the matters therein mentioned, or in respect of the property of the Company, or the surplus thereof; and that all the shareholders, except the Defendants, had a common interest in obtaining, and, in fact, consented and agreed to, the relief thereby prayed.

The

1847.

APPERLY
v.
PAGE.

The prayer of the bill was, that it might be declared that the object and purposes for which the company was proposed to be established had failed through the neglect and misconduct of the Defendants, and that the Defendants were not justified in prosecuting the undertaking after the failure thereof, and that they were not entitled to retain or deduct out of the funds of the company any expenses incurred in prosecuting the undertaking subsequent to such failure; and that an account might be taken of the receipts and payments of the Defendants, on account of the Company; and that the Defendants might be charged with and decreed to repay all monies which should appear to have been improperly paid by them out of the funds of the Company; and that the Plaintiffs and the other shareholders in whose behalf they sued might be declared liable to contribute such proportion of the expenses properly incurred, as the number of shares held by them respectively bore to the whole number into which the capital of the Company was originally proposed to be divided, or such other proportion of the said expenses as the Court should, under the circumstances, deem to be just; and that the residue of the deposits, after deducting thereout the amount of their respective contributions to such expenses, might be repaid to the Plaintiffs and the other shareholders on whose behalf they sued; and that an account might be taken of the monies and funds remaining in the hands or at the disposal of the Defendants, including a sum of 39,000*l.* which had been deposited by them in the Bank of *England*, pursuant to the Standing Orders, on applying for the Act; and that the said monies and funds might be applied in payment of the debts and liabilities properly incurred by the Defendants on behalf of the Company, if any such then remained unpaid; and that the residue thereof might be paid and applied in aid of the objects of this
suit

suit in such manner as the Court should direct; and, if necessary, that some proper person might be appointed to receive and get in the monies and assets of the Company then outstanding; and, in the mean time, that the Defendants might be restrained by injunction from receiving or demanding payment of any of such outstanding monies or assets, and from paying or assigning, or in any manner parting with, any of the monies or assets of the Company then in their possession.

1847.

 APPERLY
 v.
 PAGE.

On the hearing of the appeal,

Mr. *Speed* (in the absence of Mr. *Russell*), for the Appellant, took three points.

1st. That, inasmuch as the bill prayed not only the application of the partnership funds in payment of the partnership liabilities, as in *Wallworth v. Holt* (a), but a general account and distribution of the surplus, which was, in effect, a complete winding up of the concern and adjustment of the rights of the shareholders *inter se*, it was necessary that all the shareholders should be personally, and not merely by representation, parties to the record; *Richardson v. Hastings*. (b)

2dly. That the parties who executed the Parliamentary contract for the 955 shares, ought to have been made Defendants; and that the usual allegation, that the Plaintiffs did not know their names, was no excuse for omitting them, being evidently untrue, because their names and addresses were, by the Standing Orders, required to be stated in the Parliamentary contract, of which the Plaintiffs admitted they had obtained a copy from the Private Bill Office.

3dly. That,

(a) 4 *Myl. & Cr.* 619.

(b) 7 *Beav.* 301.

1847.
 APPERLY
 v.
 PAGE.

3dly. That, with reference to that part of the bill which sought to charge the Defendants with the consequences of their alleged misconduct, in exoneration of the rest of the shareholders, those parties who voted with the Defendants at the meeting in *May* were improperly included in the class on whose behalf the Plaintiffs professed to sue, being themselves implicated with the Defendants in the breach of trust with which they were charged.

In the course of the argument,

The LORD CHANCELLOR observed, with respect to the first point, that the express ground of the decision in *Richardson v. Hastings* was, that it appeared upon the face of the bill that questions might arise in the winding up of the concern, in which the Plaintiffs and those whom they professed to represent might have conflicting interests. The inference from which was that, if the Master of the Rolls had had such a case at the present to deal with, he would have overruled the objection.

In no case (continued his Lordship) can a person sue on behalf of others, unless what he sues for is beneficial to all whom he represents as well as to himself. Therefore you cannot ask by such a bill to rescind the contract of partnership, because *non constat* that the contract may not be beneficial to some: but here no contract exists; for the parliamentary contract contemplated an Act of Parliament being obtained in the ensuing session, and, the attempt to obtain one having failed, the contract is at an end with the purpose for which it was entered into.

Mr. *Rolt* and Mr. *Daniell* appeared for the Respondent, but,

On

On the conclusion of the argument of the Appellant's counsel,

1847.

APPERLY

v.

PAGE.

The LORD CHANCELLOR said, that before he called on the other side, he would read over the bill: that the case was one in which the Court might be under the necessity of extending the usual rule which regulated the institution of suits by some persons on behalf of themselves and others; for if the objection for want of parties (and the demurrer resolved itself into that) were to prevail here, it was evident that there would be no remedy at all, and the Defendants would be able to keep the money which they had got, in their pockets, and set the contributors at defiance. In such a case, his Lordship said, he should struggle to extend the rule if necessary; but that, according to his present impression, it would not be necessary, for that there were authorities already which would justify the Vice-Chancellor's order.

At the sitting of the Court the following day,

The LORD CHANCELLOR said:

In this case the grounds assigned for the demurrer were want of equity and want of parties: and the want of parties was stated to be, that all the shareholders were not made Defendants; the bill being by certain shareholders on behalf of themselves and all the rest, except the Defendants. But, in the course of the argument, the objection was varied from what it was on the face of the demurrer; for not only was the absence of those parties insisted on, but it was contended that, at all events, a class of persons who represented 955 shares, which had been subscribed for under particular circumstances, ought to have been parties to the suit.

Now

1847.

APPERLY

v.

PAGE.

Now the outline of the case is one which, but for certain special circumstances which are stated in the bill, is admitted not to be open to demurrer. The bill states that a plan was suggested for making a certain railway, under which many persons came in as subscribers, and, amongst others, the Plaintiffs. That a large sum of money was subscribed; but that the attempt to obtain an Act of Parliament failed, and that the scheme is now entirely at an end from the impossibility of raising sufficient capital to carry it into effect. The purpose, therefore, for which the parties came together is stated in the bill as no longer an existing purpose. The bill prays, after some directions as to disallowance of certain expenses to the Defendants, that the surplus may be divided among the shareholders in proportion to the sums subscribed by them.

Now that, apart from the special circumstances which are stated, is nothing more than the case of *Wallworth v. Holt*, in which, after reviewing all the authorities, the Court came to the conclusion that the rules of the Court permitted the Plaintiff to sue on behalf of himself and others. Therefore it is clear that on that general ground the demurrer cannot be sustained.

But then it is said, that by reason of some special circumstances in the case, certain persons cannot be supposed to be represented by the Plaintiffs. These circumstances are comprised in two distinct allegations. The bill represents the conduct of the Defendants to have been very improper towards the Plaintiffs and the other shareholders, in persisting in the scheme, after they knew that it had become impracticable; and amongst other things it states that, notwithstanding they had at an early period ascertained that it would be impossible to obtain an amount of subscriptions sufficient to enable them

1847.

APPERLY
v.
PAGE.

them to obtain an Act, they represented to the public that the subscription was full; and that for the purpose of making that appear, they procured the parliamentary contract to be subscribed by a number of their friends for 955 shares, being the number that was wanting to make up the required amount: but (and that is the charge on which the objection is founded) that those subscriptions were merely nominal, and that no shares or certificates of shares representing them, were ever issued to or taken by the subscribers, and that no part of the monies, which by the parliamentary contract were represented to be paid by way of deposit upon them, was ever paid. The statement, therefore, is, that, in order to make up the number of subscriptions for shares required by the Standing Orders, certain shares were represented as taken up by persons who never paid their subscriptions or intended to do so. And upon that it is said that those persons ought to be Defendants, because their case is not common with that of the Plaintiffs, being parties to a breach of trust; and, therefore, if they have any interest, it cannot be represented by the Plaintiffs, who complain of that breach of trust. But then there is an allegation that the Plaintiffs do not know their names: and it is not disputed that in an ordinary case that allegation is a sufficient excuse for not making such parties Defendants. But it is said that here the allegation cannot be true, because the parliamentary contract, of which the Plaintiffs have got a copy, shews who they are. But the Court cannot try the truth of an allegation upon demurrer, and, therefore, for the present it must be taken, as alleged, that the Plaintiffs are ignorant of the names of those parties, and consequently excused from making them Defendants.

The other special circumstance relied on is very much of the same character. The bill states that,

VOL. I.

3 G

pursuant


1847.

APPERLY
v.
PAGE.

pursuant to a resolution of the House of Commons during the last session, a meeting of the shareholders was called to consider whether the scheme should go on or not: "and that the Plaintiffs and numerous other shareholders caused their votes to be recorded at that meeting against proceeding with the bill; but that the Defendants, by means of scrip certificates which they had purchased, or caused to be held by persons under their influence, and by various undue means, procured a majority of votes to be recorded in favour of proceeding with the bill:" and, after suggesting a pretence that a majority of the shareholders sanctioned and approved of the bill, and authorised the Defendants to proceed with it, the bill charges the contrary to be true, and "that the Defendants had, prior to the meeting, and in order to enable them to obtain an authority to proceed with the bill, purchased, or procured to be purchased, for small sums of money, a large number of scrip certificates of shares in the company, and to an amount sufficient to enable them to carry a resolution at the meeting in favour of proceeding with the bill; and they, in fact, carried such resolution by means of the scrip so purchased and procured to be purchased."

Now, so far as the Defendants themselves purchasing shares, and thereby acquiring more influence at the meeting than they ought to have had, or would otherwise have had, that is merely an allegation affecting the conduct of the Defendants themselves. But the argument is, that all those who constituted the majority should be parties to the suit, and that they cannot now dispute the propriety of those proceedings, or of the expenses which were incurred in consequence of them. But, to sustain that objection, it must be shewn that the bill contains allegations which would constitute a defence

fence to any relief on behalf of these parties. It may ultimately be made out by the Defendants that certain of the persons who are by this bill associated with the Plaintiffs were concerned with them, (the Defendants,) in the acts complained of; and, if such a case be made out, it may no doubt hereafter create considerable difficulty in the prosecution of this suit. But that is not now the question: the question is, whether the allegations on the face of the bill shew a clear participation in a breach of trust by these parties. They may have been induced to vote in that majority by the misrepresentations which the bill alleges to have been made by the directors respecting the affairs of the company, and they may say that they are not precluded by a vote so given from seeking relief in common with the rest of the shareholders against the consequences of the proceedings which were resolved upon at that meeting.

1847.

 APPERLY
 v.
 PAGE.

These are the only circumstances which have been suggested as preventing the Plaintiffs from filing this bill on behalf of themselves and other shareholders: and, as I am of opinion that neither of these objections can be supported, I think, the demurrer was rightly overruled, and that this appeal must be dismissed with costs.

1847.

April 23. 28.

MOZLEY v. ALSTON.

The rule that a suit by individual shareholders in an incorporated company, complaining of an injury to the corporation, cannot be maintained, if it appears that the Plaintiffs have the means of procuring a suit to be instituted in the name of the corporation itself, applies equally whether the subject-matter of complaint be an act or transaction which is merely voidable at the discretion of a majority of shareholders, or an act or transaction

absolutely illegal, and incapable of being confirmed by such majority.


The Court will not entertain a bill by shareholders in an incorporated company seeking merely to restrain the directors *de facto* from acting as such, on the sole ground of the alleged invalidity of their title to their offices.

A general demurrer to a bill by two members of an incorporated railway company in their individual characters, against the corporation and twelve other members who were alleged to have usurped the office of directors, and to be exercising the functions thereof, as a majority of the governing body, injuriously to the interests of the company, praying that those twelve Defendants might be restricted from acting as directors, and be ordered to deliver the common seal, and the property, and books of the company in their possession, to six other persons, who were alleged to be the only duly constituted directors, was, on both the above grounds, allowed.

THIS was an appeal from an order of the Vice-Chancellor of *England* overruling a general demurrer to a bill filed by two persons describing themselves as holders of shares in the capital stock of the *Birmingham and Oxford Junction Railway Company* who were duly registered, and had paid all their calls in respect of such shares" against eighteen persons who, *de facto*, constituted the existing body of the Directors of the Company, and against the Company itself by its corporate title.

The bill, after setting forth certain clauses of the Company's Act, by which it was, amongst other things, provided that the number of directors should be twelve with power to the Company to increase it to any number not exceeding eighteen, and that five should be a quorum. at their meetings, stated that an ordinary meeting of the Company was held pursuant to the Act on the 27th *February* 1847, when it was adjourned to the 13th *March* at four o'clock P.M; and that an extraordinary meeting of the company was held on the same

same 13th *March* at two o'clock P. M., pursuant to a special notice thereof duly given, "for the purpose of considering the propriety of, and if so determined, taking the necessary steps at such meeting for increasing the number of directors, which was then twelve only, by the election of six new ones, and also for the purpose of considering the provisions of a bill, intituled "A proposed Bill for uniting the *Birmingham* and *Oxford* Junction Railway Company, and the *Birmingham, Wolverhampton, and Dudley* Railway Company into one, and for authorising the sale of the latter railway and other new works to the Great Western Railway Company," and of considering and determining upon the propriety of introducing into parliament, or of proceeding with or withdrawing the said bill, and, if thought fit, of taking such steps for proceeding with or withdrawing the said bill, and passing such resolutions and giving such instructions to the directors of the *Birmingham* and *Oxford* Railway Company touching any sale or other disposition of the said railway, or for effecting any of the above mentioned purposes, as the meeting should think expedient."

1847.

 MOZLEY
 v.
 ALSTON.

That at the extraordinary meeting, it was resolved that the number of directors should be increased to eighteen, and six additional directors were accordingly elected, after which the meeting was adjourned to five o'clock P. M. of the same day.

The bill then stated, in substance, that the Defendants were, on the 27th *February* 1847, the duly constituted directors of the Company, the greater part of them having been duly elected in the month of *October* 1846, and the rest having been appointed to fill vacancies which had occurred during the interval; and that, according to the true construction of the Company's Act, one-third of the

1847.

MOZLEY


v.

ALSTON.

number ought to have gone out, by balloting or agreement amongst themselves, at the ordinary meeting of the 27th *February*, or the adjourned ordinary meeting of the 13th *March*, and to have been replaced by the election of four new directors; and that, accordingly, at the adjourned ordinary meeting, which was duly held on the 13th *March* at four o'clock, a shareholder moved that one-third of the directors who were in office previously to the 27th *February* 1847 should retire from office, pursuant to the provisions of the Act, and that the twelve should agree or determine among themselves which of them should retire; but that, although the motion was duly seconded and carried unanimously by all the shareholders present at the meeting, except the twelve original directors themselves, the chairman, who was one of their number, refused to put it, and the twelve refused to retire or to determine or agree which of them should retire, insisting that they were still lawful directors and entitled to act as such; and that, in consequence of such refusal, the shareholders present at the meeting were deprived of, and unable to exercise, their right of electing persons to supply the place of the directors who ought then to have retired.

The bill then stated that the adjourned extraordinary meeting was duly held at five o'clock of the same day, when it was resolved, that the proprietors of the Company, wholly disapproving of the proposed amalgamation of the *Birmingham* and *Oxford* railway with the *Birmingham, Wolverhampton, and Dudley* railway, and of the proposed sale of both concerns to the Great Western, the directors should be, and they were, thereby instructed not to proceed with, but to withdraw from, the bill then before parliament for those objects, and that they be further instructed to affix the Company's seal to the petition then read against such bill,

bill, and to take all necessary measures for opposing it in both houses of Parliament ; and the chairman having refused to affix the common seal of the company to such petition, it was further resolved that certain shareholders, who were specified, should be authorised to sign the same on behalf of the meeting.

1847.

 MOZLEY ·
 v.
 ALSTON.

That there were present at both the adjourned meetings upwards of seventy shareholders holding personally, and representing by proxy, upwards of 35,000 shares out of 50,000, which constituted the whole capital, and that all the resolutions come to at those meetings were passed almost unanimously, except that the twelve original directors declined to vote and objected to the said resolutions.

The bill then charged that, by reason of the aforesaid conduct of the twelve directors at the adjourned ordinary meeting, it had become impossible to ascertain which of them ought to have retired from office, and consequently that they were not, nor was any of them, competent in law to act or vote as directors or a director of the Company, and that the six newly appointed directors were the only persons now competent to act as lawful directors thereof; but that the twelve, nevertheless, retained the possession and custody of the common seal, and the books and documents of the Company, to the exclusion of the six new directors, although such possession and custody by the lawful directors was absolutely necessary for the interests and purposes of the Company; and that the Defendants, asserting that they were a majority of the body of directors, threatened and intended to assemble and vote as such, and to employ the common seal, and thereby to represent their acts as the lawful corporate acts of the Company, and to bind the Company thereby : that they

1847.

MOZLEY

v.


ALSTON.

had in fact acted, and were now acting, in divers matters which were of the utmost importance to the Company, and had under their control large sums of money, amounting to upwards of 100,000*l.* belonging to the Company, which they threatened and intended to deal with and expend; and that previously to the adjourned ordinary meeting, they had procured the before-mentioned bill to be brought into Parliament, and that they intended to represent themselves before Parliament as a majority of the lawful directors of the Company, and in that pretended character to procure the said bill to be passed; and, by retaining the common seal in their exclusive possession and control, to prevent the use thereof by the Company or its lawful officers, for the purposes of the Company, and to prevent the Company from being represented before Parliament by its lawful directors, counsel, and agents; whereas, the bill charged that, the twelve had ceased to be, and were now, incapable of acting as lawful directors of the Company, and that the Company and its interests would be greatly prejudiced if they should be permitted to act as directors of the company in the matters therein mentioned or otherwise, although the Plaintiffs did not seek to prevent them from acting or being represented before Parliament or otherwise, as they might think fit, in their own names and characters, as individual shareholders.

The prayer of the bill was, that the twelve directors and every of them might be restrained by injunction from voting or acting as directors or a director of the Company, and that they might be ordered to place the common seal, and all the books, documents, and property of the company, in their custody, possession, or power, under the control of the lawful directors of the Company for the purposes of the Company.

The

The Corporation and the twelve directors whose title was impeached, put in two separate demurrers, both of which were overruled by the Vice-Chancellor. On the hearing of the appeal,

1847.

 MOZLEY
 v.
 ALSTON.

Sir *Fitzroy Kelly*, Mr. *Rolt*, and Mr. *G. Russell*, appeared for the Appellants.

Mr. *Bethell*, Mr. *James Parker*, and Mr. *Willcock*, appeared for the Respondents.

A great part of the argument turned upon the construction of the Act of Parliament, the Appellants contending, in opposition to the construction suggested by the bill, that none of the twelve directors who were in office on the 13th of *March*, were bound to have then retired, but that they were all entitled to retain their offices until the ensuing year; and that, even if they ought to have balloted out four of their number on the 13th of *March*, it did not follow that they, or any of them, therefore, ceased to be directors, or to act as such, so long as no others were validly appointed in their places.

On the question of jurisdiction, and the frame of the bill,

It was contended, on the part of the Appellants, that, if the Plaintiffs were right upon the construction of the Act, the proper remedy was at law, by *mandamus*; and, further, that, as the subject-matter of complaint, if it was an injury at all, was an injury to the whole corporation, the suit could not be sustained by individual members, unless, at least, it were shewn that the Company could not, or would not, institute proceedings in their corporate capacity: *Foss v. Harbottle*. (a)

On

(a) 2 *Hare*, 461.

1847.

MOZLEY
v.
ALSTON.


On the other hand, it was insisted that *Foss v. Harbottle* did not apply, the only point *decided* in it being, that the Court would not interfere with transactions, affecting a Company, which were merely voidable, at the instance of some only of the shareholders, although they professed to sue on behalf of themselves and the others; because such transactions were capable of being confirmed, and different members of the Company might entertain different opinions as to the expediency of confirming them. But what the Court was asked to do in the present case, was to interfere, not with what was merely voidable, but with acts, which, if the Plaintiffs were right, were illegal and absolutely void, and which, therefore, could not be confirmed by a majority of shareholders, however large, so long as there was one who objected to them: for the complaint was, that twelve out of eighteen directors who assumed to act as a majority of the governing body were illegally in possession of their offices, and had no authority to act at all: and that was a complaint for which each and every shareholder in the corporation was entitled to seek redress without the concurrence of the rest, and even in spite of the rest.

It was upon that principle, that both in *Ware v. The Grand Junction Waterworks Company* (a) and in *Ward v. The Society of Attorneys* (b), the Court granted an injunction against a company and its governing body at the instance of a few individual members. Those cases then were authorities in point, for the frame of this bill: and as to the substance of it, there could be no doubt that it was the familiar practice of this Court to entertain jurisdiction for the purpose of keeping great public bodies within the limits of their parliamentary or corporate

(a) 2 R. & M. 470.

(b) 1 Coll. 370.

porate powers. That was the object of this suit. It was said, indeed, that the proper remedy was by *mandamus*; but, even supposing that the writ would lie in such a case, which was perhaps doubtful, *Regina v. Alderson (a)*, the remedy it afforded, would, without the aid of the ancillary jurisdiction of this Court, be too tardy to be effectual for its purpose.

1847.

 MOZLEY
 v
 ALSTON.

The LORD CHANCELLOR.

This is a case in which two persons, not alleging distinctly that they are shareholders in a railway Company, but so describing themselves, file a bill in which they allege, that, owing to circumstances which I do not particularly enter into, twelve persons who were originally appointed directors, ought, at a day now past, to have ballotted out four of their number in order that four others might be elected in their stead: that they omitted to do so, and that, consequently, there is not now a body of directors constituted according to the Act; and, therefore, praying an injunction to the effect that these twelve persons may be restrained from voting or acting as directors of the company, and that they may be ordered to deliver the seal and the property and books of the company in their possession into the hands of six other persons, who, the bill alleges, were appointed under a provision of the Act, authorising the Company to increase the number of the directors from twelve, the number originally contemplated, to eighteen. The result, therefore, of the injunction prayed, is, that twelve out of eighteen who now exercise the functions of directors, may be restrained from acting, and that all the duties of the governing body may be performed by the six.

Now

(a) 1 Q. B. Rcp. 17.

1847.

MOZLEY
v.
ALSTON.

Now the first thing to be observed is, that the bill does not pray that the Court may set right what is alleged to be wrong; but there being, according to the allegation of the bill, four among the twelve who ought to have gone out, and it being, as it is alleged, impossible to ascertain who those four are, it is insisted that the whole of the twelve are illegally exercising the functions of directors, and ought to be restrained from so doing.

Now it is not my intention to give any opinion upon the construction of the Act, because I see quite enough to make it my duty to allow these demurrers, without going into that question; and, indeed, one of the grounds on which I have come to this conclusion is, that it is not within the jurisdiction of this Court to entertain that question at all, and I therefore abstain from expressing any opinion upon it.

The bill, as I stated, is a bill by two shareholders in their individual characters only, praying relief, in which all the other shareholders are interested. It is quite clear that some years ago no one would have entertained any doubt that such a bill was demurrable. It is true that the rule which requires all persons interested to be parties, has been relaxed to meet the exigencies of modern times, it being found that too strict an adherence to it would operate in many cases as a denial of justice, and leave parties who had a real grievance without a remedy. And, therefore, where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court has permitted one or more of them to sue on behalf of all, subject, however, to this restriction, that the relief which is prayed must be one in which the parties whom the Plaintiff professes to represent, have all of them

them an interest identical with his own: for if what is asked may by possibility be injurious to any of them, those parties must be made defendants, because each and every of them may have a case to make, adverse to the interest of the parties suing; *Taylor v. Salmon* (a), *Wallworth v. Holt*. (b) If, indeed, they are so numerous that it is impossible to make them all defendants, that is a state of things for which no remedy has yet been provided; but no such inconvenience arises in the present case; and it is sufficient for the present purpose to say, that in the cases to which I have referred as instances of the relaxation of the rule, all persons interested in the subject-matter of the suit have been parties either actually or by representation, and that in none of those cases has it been permitted to one or two to institute a proceeding in their individual characters for a purpose common to all. The evil which would result from such a course is perfectly apparent; for if it were permitted to one or two, it must be permitted to all, and then as many bills might be filed as there were shareholders in a company, all praying different things, or the same thing in a thousand different ways. I think, therefore, that if there were no other objection to this bill, but the shape and form of it, as filed by one or two shareholders, not on behalf of themselves and others, but in their individual characters only, that objection alone would be fatal to it.

That, however, might be easily corrected by amendment, and, therefore, a decision upon that point only would not finally dispose of the question between these parties. But another and more important objection is this. The complaint against the Defendants is, that they are illegally exercising the powers of directors, and illegally retaining the seal and property of the Company.

That,

(a) 4 *Myl. & Cr.* 134.

(b) *Ibid*, 619.

1847.

MOZLEY
v.
ALSTON.

1847.

MOZLEY
v.
ALSTON.

That, if it be an injury at all, it is an injury not to the Plaintiffs personally, but to the corporation of which they are members—a usurpation of the office of directors, and, therefore, an invasion of the rights of the corporation; and yet no reason is assigned by the bill, why the corporation does not put itself in motion to seek a remedy.

A case occurred some time ago before Vice-Chancellor *Wigram*, which is identical in principle with the present, I mean the case of *Foss v. Harbottle*. An attempt, indeed, was made to distinguish them, but it entirely failed. In one respect, that was a stronger case for the interposition of this Court than the present, for the bill stated a case of malversation in the corporate officers which was properly a subject of equitable relief. The Plaintiffs sued, not as here in their individual characters only, but on behalf of themselves and all the other shareholders, except a few who were made Defendants; but the Vice-Chancellor, after examining all the authorities, decided that such a bill could not be supported; and as one of the reasons for coming to that conclusion, he said that, for any thing that appeared to the contrary, there existed in the Company the means of rectifying what was complained of, by a suit in the name of the corporation. And the same observation applies with still greater force to the present case, for not only does it not appear that the Plaintiffs have not the means of putting the corporation in motion, but the bill expressly alleges that a large majority of the shareholders are of the same opinion with them; and, if that be so, there is obviously nothing to prevent the company from filing a bill in its corporate character to remedy the evil complained of. Such a bill would be free from the objections to which I have referred as existing in this case, for it would be a bill by a body legally authorized
to

1847.

MOZLEY
v.
ALSTON.

to represent the interests of the shareholders generally; but to allow, under such circumstances, a bill to be filed by some shareholders on behalf of themselves and others, would be to admit a form of pleading which was originally introduced on the ground of necessity alone, to a case in which it is obvious that no such necessity exists. It appears to me, therefore, that the case of *Foss v. Harbottle*, so far as relates to this point, is identical in principle with the present; and thinking, as I do, that the observations of the Vice-Chancellor in that case, in which he pronounced a very elaborate judgment, correctly represents what is the principle and practice of the Court in reference to suits of this description, it is unnecessary for me to say more on the present occasion, than that I fully concur in them: and I should not hesitate to adopt them in this case, even if the first objection, to which I have referred, was removed, by making this a bill on behalf of the shareholders generally, instead of being a bill by two of them in their individual characters only.

But there is another thing in the way of the Plaintiffs which must be very carefully considered before any other attempt is made to obtain the interposition of the Court in a case like the present; and that is, that the ground on which the whole complaint rests, is, that those who are acting as directors are not directors. All turning, therefore, on the question, whether they are or are not entitled to the corporate offices, the functions of which they profess to exercise. I asked several times, in the course of the argument, whether there was any instance to be found of a bill seeking such relief as is here prayed, solely on the ground of the supposed invalidity of the title of persons claiming to be corporate officers. The argument was interrupted by an interval of several days, yet no such case was produced. I did not expect to hear of one, and the search which I must presume

1847.

MOZLEY

v.

ALSTON

presume has been made by Counsel, satisfies me that no such case exists. This, therefore, is the first time that the Court has been called upon to interpose under such circumstances. That alone would be sufficient to deter me from assuming a jurisdiction which, it appears, my predecessors have never exercised, and of which it would be difficult to assign the limits or the end. The whole case depends upon a pure question of law—whether the parties claiming to be directors do or do not lawfully fill that character. That is a preliminary question which must be decided before this Court can make any decree: there are other modes open to the parties by which it may be decided, and I will not be the first to bring it into a Court of Equity. But when it is decided, and even supposing that it is decided in favour of the Plaintiffs, what will there remain for the Court to do? It is not pretended that I can give directions which will set this corporate body right, if it has gone wrong; I am not asked to direct that a meeting should be convened in order to determine which of the twelve persons ought to go out of office, and to appoint others in their place; it is not pretended that I have jurisdiction to do that; but the only equitable relief which I am asked to administer is to restrain them from acting as directors. Is not that asking me to do what, in the great majority of cases, would put an end to the corporation altogether? It may not be so in this case, because six other directors have been appointed; but the jurisdiction, if admitted, would extend to a case in which that circumstance did not exist. And yet this is what these Plaintiffs, who profess to have the interests of the corporation at heart, ask me to do.

Any one of these reasons would satisfy me that the Court ought not to exercise jurisdiction upon this bill. And I am, therefore, of opinion, that the demurrers ought to be allowed.

1847.

FOWLER v. JAMES.

Jan. 14.

THE bill in this case was filed by Mrs. *Fowler*, a married woman, praying that a settlement might be executed, under the decree of the Court, in conformity with her marriage articles.

The articles provided, amongst other things, that all property to which the wife should become entitled during the coverture should be brought into the settlement; and, after the usual limitations to the husband and wife, and the children of the marriage, there was an ultimate trust in the event of there being no children and the wife dying in the lifetime of the husband without having made any appointment by will, for the persons who, at the time of her death, would have been entitled to her personal estate, by the Statute of Distribution, in case she had died a widow and intestate.

Where property is settled in trust, in remainder, for the persons who should be the next of kin of the tenant for life at her death, the presumptive next of kin are not necessary parties to a suit instituted for the execution of the trusts during the lifetime of the tenant for life.

The bill alleged that the Plaintiff had become entitled to property from various sources since the marriage, and that there were questions whether certain portions of such property were bound by the articles.

The only issue there had been of the marriage had died without attaining a vested interest, and the only Defendants to the suit were *James* (the covenantee in the articles), and the husband.

On the cause coming on to be heard before the Lord Chancellor,

1847.

FOWLER

v.

JAMES.

Mr. *Cooper*, for the Defendant *James*, mentioned the case of *Wardle v. Hargreaves*(a), in which Vice-Chancellor Knight *Bruce* had under similar circumstances held that the presumptive next of kin of the wife were necessary parties to the suit.

The LORD CHANCELLOR.

It is so uncertain who will be the next of kin of the wife at her death. To hold that those who are at present her next of kin are necessary parties seems inconsistent with the rule *nemo est hæres viventis*. I do not think they are necessary parties in this case.

Mr. *James Parker*, Mr. *Stinton*, and Mr. *Rogers* were also counsel in the cause.

(a) 6 *Jur.* 478. *S. C.* but *qu. ?* misreported 1 *Y. & C. C. C.* 265.

Jan. 14.

In the matter of TOWNSHEND, a Lunatic.

A petition to confirm the Master's report in lunacy, and a cross-petition in the nature of exceptions to it, coming in to be heard together. Held (overruling *In re Bariatinsky*), that the counsel for the cross-petition ought to begin.

IN this case, there were was a petition to confirm the report of the Master in Lunacy, and a cross petition in the nature of exceptions to the report. A question being raised as to the right to begin, *In re Princess Bariatinsky* (a) was referred to, but

The LORD CHANCELLOR held that the counsel for the cross petition ought to begin; for the other petition was of course.

Mr. *Bacon* for the petition.

Mr. *James Parker* for the cross petition.

(a) *Ante*, p. 442.

1847.

ARNOLD v. ARNOLD.

April 30.

THE Plaintiff having been served by a Defendant whose answer had become sufficient more than four weeks, with notice of motion to dismiss the bill for want of prosecution, obtained, as of course (*a*), an order for leave to amend the bill, there being several other Defendants against whom subpoenas were prayed who had not answered. Whereupon the defendant who had answered, moved to discharge that order for irregularity, on the ground that his answer being the last which had been filed, and more than four weeks having elapsed since it was to be deemed sufficient, an order for leave to amend could only be regularly obtained upon a special application. The motion having been refused by the Master of the Rolls, was now renewed by way of appeal before the Lord Chancellor.

“The last of several answers” in the 66th Order of May 1845, and “the last answer” in the 68th Order, mean the last answer that is required to be put in before a replication can be filed.

Distinction between evasion of the General Orders and irregularity.

Mr. Cooper and Mr. Hare for the motion.

Mr. Elderton *contra*.

The first question was whether in the sixty-sixth General Order of May 1845, which provides that an order for leave to amend a bill may be obtained by the Plaintiff at any time before filing a replication, and within four weeks after the answer, or the last of several answers, is to be deemed sufficient, the words “the last of several answers,” and in the sixty-eight Order the

(*a*) The General Order of practice, had not then been published. April 13th, 1847, prohibiting that

1847.

ARNOLD
v.
ARNOLD.

the words "the last answer," meant the last answer actually put in, or the last answer of all the Defendants who were required to answer; the Plaintiff contending, for the latter construction, the Defendant for the former. *Dalton v. Hayter (a)*.

But it was further contended on the part of the Defendant, that even if the latter construction should prevail, the order in question was still irregular, inasmuch as the Plaintiff had taken no steps to get in the answers of the Defendants who had not answered, not having even served them with subpoenas; and, therefore, that their answers could not be treated as answers within the spirit of the General Order which had been referred to. *King of Spain v. Hullett (b)*, *Cooke v. Betham (c)*.

The LORD CHANCELLOR.

Both these Orders evidently contemplate a case in which the Plaintiff is in a situation to put the cause at issue — in which the suit is in a state for a replication to be filed. I think, therefore, it is clear that "the last answer" must mean the last answer to be put in previous to replication. The other construction would lead to great inconvenience; the right of the Plaintiff to amend would be continually changing as the Defendants successively put in their answers.


It is contended, however, in this case, that according to either construction, the order in question must be discharged; because, though there are other answers to be put in, the Plaintiff has not taken any steps to get them in, and it is insisted that he can derive no benefit from his own default. But the notice of motion is, that
the

(a) 7 *Beav.* 586.

(b) 3 *Sim.* 338.

(c) 1 *C. P. Coop.* 403. .

the order may be discharged *for irregularity*; and though I think that the course which the Plaintiff has taken is an evasion of the General Orders, and I should, on that ground, have discharged the order, if the notice of motion had been to discharge it generally, yet as he is within the letter of those Orders, I do not think that his course has been, strictly speaking, irregular, and, therefore, as the motion stands at present, I must refuse it, though if the words “for irregularity” had been omitted, I should, for the reason I have stated, have discharged the order.

1847.

 ARNOLD
 v.
 ARNOLD.

In consequence of this intimation, it was arranged by consent, that the notice of motion should be considered as amended, and the order was discharged.



AN
INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ABATEMENT.

See ANNUITY, 3.

OFFICIAL ASSIGNEE.

ACCOUNT.

An account between a banker and his customer, consisting of three items only and interest, held not to be a proper subject for a bill in equity. *Foley v. Hill.* Page 399.

ADMINISTRATION SUIT.

Mere neglect of duty in an executor, as, for instance, the omission to invest balances pursuant to a direction in the will, if unaccompanied by fraud, is not such misconduct as to disentitle him to the general costs of a suit for the administration of the estate, although it may subject him to the costs of so much of the suit as was occa-

sioned by such neglect. *Heighington v. Grant.* Page 600

AFFIDAVIT.

I. Annexed to Bill.

Where an act of parliament required that to all bills which should be filed under its provisions an affidavit, of a certain form, should be annexed: Held, that it was no objection to an affidavit which had been annexed to a bill filed under the Act, that it had been sworn three days before the bill was filed. *Walker v. Fletcher.* Page 115

II. In opposition to Answer.

1. An order made under 5 *Vict. c. 5. s. 4.*, to restrain the transfer of stock, continues in force, until discharged, after a bill has been filed for the same purpose: and

on a motion being afterwards made to discharge it, the Court will allow affidavits to be read as well in opposition to the answer, if then filed, as in support of it. *In re Marquis of Hertford.*

Page 203

2. Where a Plaintiff moves upon the answer, he is not allowed to verify by affidavit any allegation, in the bill, of a fact connected with his title, though such allegation be neither admitted nor denied by the answer.

Where the bill set forth a letter as containing an admission of the Plaintiff's title, and which it charged to have been written by the Defendant, but the Defendant, who was very old and nearly blind, stated that such a letter might have been written by somebody about him, but that to the best of his recollection and belief he had never written such a letter: Held, on a motion for production of documents, that the letter, with an affidavit of its being in the Defendant's handwriting, could not be admitted as evidence of the Plaintiff's title for the purpose of the motion. *Edwards v. Jones.*

Page 501

See GENERAL ORDERS.

PRODUCTION OF DOCUMENTS, 2.

AGREEMENT.

See STAMP.

VOLUNTARY SETTLEMENT, 2.

ALIEN.

See LUNATIC, 1.

ALIENATION (RESTRAINT OF).

See ANTICIPATION.

AMENDMENT.

I. Of Bill.

See GENERAL ORDERS.
PRACTICE.

II. Of Patent Roll.

See PATENT.

ANNUITY.

1. *A.*, by several deeds of the same date, granted, for valuable considerations, several annuities or rent-charges for lives, to be issuing and payable out of certain real estates, of which he was the owner, reserving to himself and his heirs, in each case, a power to repurchase the annuity, on payment, at three months' notice, of the original price, together with a half-yearly payment of it in advance. Each annuity was secured by the personal covenant of the grantor, by clauses of distress and entry in case it should be a certain number of days in arrear, and by a warrant of attorney to confess judgment against the grantor for double the original price. And by another deed of even date which recited the annuities as being respectively subject to "a proviso for redemption or repurchase," the real estates on which they were charged were conveyed to trustees for a term of years, with a power

power of sale to secure the regular payment of them, and, subject thereto, on trust for the grantor. The grantor by his will charged his real estates in aid of his personal estate with the payment of his debts, other than mortgage debts, and, subject thereto, devised them in strict settlement.

Held, (reversing the judgment below,) that the annuities were to be treated as securities for the repayment of loans, and consequently that the value of them (there being no personal assets for their payment) was, by virtue of the will, a charge upon the corpus of the real estates, and that the tenant for life of the real estates, as between him and the remainder-man, was only liable to keep down the interest on such value. *Bulwer v. Astley*.

Page 422

2. Upon a devise of real estates in trust, to receive the rents, and thereout to pay to the testator's widow an annuity, and "from and immediately after" her death to convey the estates to his three sisters. Held, (reversing the decision below), that the annuity was a charge only on the rents which accrued during the life of the widow, and not on the corpus of the estates. *Foster v. Smith*.

Page 629

3. Gift of an annuity of 300*l.* to the testator's three daughters and the survivors and survivor, with a gift over, to the last survivor, of the sum set apart to answer the an-

nuity. After the death of one of the daughters, the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two: but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, becoming available, Held, that such sum was to be apportioned rateably between the arrears due to the two surviving daughters respectively at the time of the death of that one of them who died first, and the sum originally set apart, and which belonged to the last survivor. *Innes v. Mitchell*.

Page 710

ANNULLING FIAT.

See BANKRUPT, 5.

ANSWER.

See PLEADING, 1.

SUPPLEMENTAL ANSWER.

ANTICIPATION CLAUSE.

1. Gift by will of leasehold and other personal estates to trustees in trust to pay the rents, &c. to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, and, in default of such appointment, or so far as the same should not extend, into her proper hands for her sole and separate use, with a direction that her receipts, notwithstanding

withstanding coverture, should be good discharges, and, after her death, in trust for her children. Held, upon the particular terms of the gift, that the restraint on anticipation applied to an assignment, by the married woman, of her separate estate as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts *alone* should be good discharges *Brown v. Bamford.*

Page 620

2. A court of equity will give effect during coverture to a clause in restraint of alienation, annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, and whether it be in fee or only for life. *Baggett v. Meux.*

Page 627

APPEAL.

1. *Semble*, where a decision of the Court of Review is brought under the review of the Lord Chancellor by a simple appeal petition, without a special case, no appeal lies from his decision to the House of Lords.

Where the Court of Review had committed a party for a contempt, and had afterwards restrained him by injunction from prosecuting an action for false imprisonment against the Plaintiff, who obtained the order of commitment, the Lord Chancellor, upon both the orders being brought under his review

by a simple appeal petition, without a special case, discharged the order for the injunction, on the ground that doubts might be entertained whether the form of the proceeding before him admitted of an appeal from his decision to the House of Lords, whereas a writ of error would lie from that of the court of law. *Ex parte Van Sandau.*

Page 445

2. Where an order of this Court made in pursuance of an order of the House of Lords, reversing the decree below and dismissing the bill with costs, had omitted to direct repayment of a sum of money which had been paid by the Defendants to the Plaintiff under the decree pending the appeal; the Court, on the petition of the Defendants, made a further substantive order for such repayment. *Thorpe v. Mattingley.*

Page 445

See COURT OF REVIEW.

IMPERTINENCE.

REHEARING.

RIGHT TO BEGIN.

STAY OF EXECUTION.

ATTACHMENT.

It is no objection to the regularity of a writ of attachment, that another similar writ has previously issued against the same party, but which has not been acted on. *Andrews v. Walton.*

Page 619

See PAUPER.

PRO CONFESSO, 2.

ATTORNEY.

ATTORNEY-GENERAL.

See CHARITY.

COSTS, I.

SCHEME.

TRUSTEES.

BANKER.

See ACCOUNT.

BANKRUPT, 4.

CONSTRUCTION, IV. 5.

STAT. OF LIMITATIONS.

BANKRUPT.

1. A creditor, whose debt was secured by the joint and several covenants of two partners in trade, and also by a mortgage on part of the joint property, admitted to prove his debt against the separate estate of each, without surrendering or realising his mortgage security. *In re Plummer.* Page 56
2. A deposit of a policy of assurance by way of security for a debt, made previously to the commission of an act of bankruptcy by the depositor, and notified to the insurance company, by the party with whom the deposit was made, previously to the issuing of the fiat, though subsequently to the act of bankruptcy: Held valid as against the assignees under the 2 & 3 Vict. c. 29., it not appearing that, at the time the notice was given to the company, the party giving it was aware of an act of

bankruptcy having been committed. *In re Styant.* Page 105

3. An innkeeper, who was a widow, having died intestate, two of her children, a son and daughter, took possession of her furniture and stock in trade, and carried on her business in their own names for two years after her death, during which time they paid her funeral expenses and some of her debts, but without taking out administration to her estate, and, at the end of that time, became bankrupts, the daughter having a few months previously retired from the business, and sold her share of it to the son. Another of the children then took out administration to the intestate, and claimed that part of her furniture and stock in trade which still remained in specie; but, Held that it belonged to the assignees, as having been in the order and disposition of the son at the time of his bankruptcy *In re Thomas.* Page 159
4. A customer of a banking firm, whose practice it was to receive deposits, at their banking-house, of boxes of securities belonging to their customers, for safe custody, lent part of the securities contained in his box to the firm, upon an undertaking to replace them in three months, or sooner if required; and he afterwards lent other part of such securities to J. W., one of the partners in the firm, on his own separate account, other securities being on both

both occasions deposited by the respective borrowers, according to agreement, in pledge for those which were borrowed. After the expiration of three months from the time of the first loan the firm, with the consent of the customer, deposited other securities in the box in exchange for those first pledged, and afterwards became bankrupt, when it appeared that the customer had been regularly credited in the books of the firm with interest on all the securities borrowed, but that *J. W.* had, without the knowledge either of his co-partners or the customer, abstracted the securities pledged by himself upon the second loan, and had applied the proceeds to his own individual use.

Held, 1st, that the value of the securities lent to the firm was not a contingent debt within the fifty-sixth section of 6 G. 4., and that, as there had been no demand for their replacement before the bankruptcy, the customer had no proveable debt in respect thereof, either against the joint estate or any of the separate estates.

2dly, that the firm was not responsible for the abstraction by *J. W.* of the securities pledged upon the second loan, although the key of the box, as well as the box itself, was left in the custody of the firm, inasmuch as it did not appear that the firm had any authority to open the box or to examine its contents: and consequently that the customer had

no right of proof, in respect of the second loan, against the joint estate, but only against the separate estate of *J. W.*

And, *semble*, even if the firm had been chargeable for the abstraction on the ground of negligence, the claim would have been only a claim for unliquidated damages, and therefore not proveable against the joint estate. *Ex parte Eyre, in re Wright.* Page 227

5. If a bankrupt has failed to commence any action, suit, or other proceeding to annul the fiat within the time limited for that purpose by the twenty-fourth section of 5 & 6 Vict. c. 122. the Court of Review has no discretionary jurisdiction to entertain a petition, presented after that time has expired, to annul the fiat, however satisfactorily the delay may be accounted for. *In re Thorold.* Page 239

BOARDERS.

See GRAMMAR SCHOOL, 2.

BREACH OF TRUST.

See ADMINISTRATION SUIT.

CHARGE OF DEBTS.

See CONSTRUCTION, IV. 2.

CHARITY.

1. A testator in disposing of "the property

property of which he should be possessed at his death after payment of debts and expences," made several specific and pecuniary bequests, and then directed his executors, amongst other things, to purchase and prepare for the ultimate deposit of his own body, and for the removal and deposit of the remains of his parents and sister then lying interred in a certain churchyard, a certain piece of unconsecrated ground then belonging to another person, on which they were "to build a suitable, handsome, and durable monument, the expense to be met and provided from the surplus property that should remain after payment of the above legacies and bequests, &c." After which he gave "the remainder of his property to the government of *Bengal*, to be applied to charitable, beneficial, and public works, at and in the city of *Dacca* in *Bengal*, for the exclusive benefit of the native inhabitants, in such manner as they and the government might regard as most conducive to that end."

Held, first, that the direction as to the monument was not a charge upon the residue, but a bequest of such integral part of the residue as would be necessary for carrying the direction into effect. Secondly, that even supposing that direction to be void, it did not invalidate the subsequent bequest to the government of *Bengal*, if otherwise valid,

inasmuch as the sum necessary for carrying the direction as to the monument into effect was capable of being ascertained. Thirdly, that the bequest to the government of *Bengal* was a good charitable bequest.

Whether the direction as to the monument is void, *quære?* *Mitford v. Reynolds.* Page 185

2. Where a legacy was given by a will to *A. B.*, "to be applied to the use of" a certain Roman Catholic College, and *A. B.* died in the testator's lifetime, the Court on being satisfied of the respectability and permanent character of the institution,* ordered the legacy to be paid to the President of the College, who was the officer intrusted with the management of its pecuniary affairs, without requiring any scheme to be settled, although the Attorney-General asked for one. *Walsh v. Gladstone.* Page 290
3. Observations on the doctrine of limiting the participants in a fund devoted to the poor of a parish, to those who are not in receipt of parochial relief.

Semble. A sounder rule is to administer the charity according to the ordinary rule, and leave to chance to what extent it may operate to the relief of the poor-rate.

The order of reference to approve of a scheme, in such a case, contained a special authority to the Master to include provisions for educating, clothing, and apprenticing

prenticing the children of the poor, advancing sums by way of loan, &c.

Sketch of scheme pursuant to such order.

Semble. A decree, containing a declaration as to the proper mode of applying the income of a charity estate with reference to the founder's deed, need not be reheard, in order to enable the Court, on the hearing of a subsequent information, to make a different prospective declaration in reference to the same question.

Attorney-General v. Bovill.

Page 762

See GRAMMAR SCHOOL.
PRACTICE.

COLLATERALS.

See SPECIFIC PERFORMANCE.

COMMITTEE.

See RECOGNIZANCE.

COMPOSITION DEED.

Where a composition deed between a debtor and his creditors provides, that those who come in under it shall thereby release their debts, a lien creditor cannot realise his lien and prove for the difference, but if he elects to take the benefit of the deed, must first give up the property on which he claims the lien. *Buck v. Shippam.*

Page 694

CONSTRUCTION.

I. *Annuity Deed.*— See ANNUITY, 1.

II. *Power of Appointment.*

A testator bequeathed 1700*l.* stock to trustees, in trust to pay the dividends to *J. C.* and *S.* his wife, during their lives, and the life of the survivor, and after their decease, then in trust to transfer or pay over the stock unto their children, in such shares and proportions as the survivor of them, *J. C.* and *S.* his wife, by his or her last will, should direct or appoint. At the death of the testator, *J. C.* and *S.* had three children living. After the deaths of *S.* and two of those children, *J. C.*, by will, appointed the whole fund to the only surviving child. Held, a good appointment. *Woodcock v. Renneck.*

Page 72

III. *Settlement.*

By a marriage settlement a sum of money, the property of the wife, was vested in trustees in trust for the separate use of the wife during her life, and after her decease in trust for the husband during his life, and after the death of the survivor, upon certain trusts for the children, and in default of children, who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in trust for such person or persons as the wife should, notwithstanding her coverture, by deed

deed or will appoint, and in default of appointment, in trust to pay and transfer the same to the executors or administrators of the wife. Held, reversing the decree below, that under the ultimate limitation to the executors or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administratrix of the wife as part of her general personal estate.

Daniel v. Dudley. Page 1

See SPECIFIC PERFORMANCE.

IV. Will.

1. A testator began his will by bequeathing the whole of his property to his wife for life, and afterwards to be equally divided between his children. He then gave to each of his children and to his wife some pecuniary and specific legacies, and afterwards bequeathed as follows. "The property, my house, 21. North Street, St. Marylebone, let on lease at 48*l.* a year, 1000*l.* new 4 per cents., 1500*l.* in the 3 per cent. consols, 645*l.* in the threes reduced, and 20*l.* per annum in the long annuities, all this I give to my wife, with the residue and interest, should there be any." Held, that the widow took a life interest only in the general residue, including the particulars enumerated in the concluding clause, but that of those particulars she was entitled to the

enjoyment in specie. *Vaughan v. Buck.* Page 75

2. A testator began his will by directing that all his just debts, funeral and testamentary expenses, should be fully paid and satisfied. He then devised all his real estate to his daughter and her issue in strict settlement; and after giving one specific and one pecuniary legacy, he gave all the residue of his personal estate (after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies before bequeathed) to his said daughter. Held, reversing the judgment below, that the concluding clause of the will was not sufficient to rebut the presumption, arising from the first, of an intention to charge the real estate in aid of the personality with the debts. *Price v. North.* Page 85

3. A devise to the second son of *Edward Weld*, of *Lulworth*, held, upon the context of the will and upon extrinsic evidence as to the state of the *Weld* family and the degree of the testator's acquaintance with the different members of it, to mean a devise to the second son of *Joseph Weld*, of *Lulworth*, although there was a person named *Edward Joseph Weld* (the eldest son of *Joseph Weld*), who resided with his father at *Lulworth*, and who usually went by the name of *Edward* only, and although a former will of the testator, made several years

years before the will in question, contained a devise to the same *Joseph Weld*, by his right name. *Blundell v. Gladstone*. Page 279

4. Under a gift of a sum of money "to my daughter *J. H.*, to be employed for her use in the following manner;" accompanied by a direction that the fund should be invested and the interest only paid to the daughter during her life, and in case she should marry and have children, then the principal to be divided amongst such children. Held, upon the construction of the whole will, the daughter having died without children, that her personal representative, and not the residuary legatee, was entitled to the fund. *Campbell v. Brownrigg*. Page 301
5. A testator's balance at his banker's held, upon the construction of his will, to pass under the words "ready money." *Parker v. Marchant*. Page 356

See WILL.

CONSTRUCTIVE NOTICE.

See NOTICE.

CONSTRUCTIVE REVOCATION.

See REVOCATION.

CONTINGENT DEBT.

See BANKRUPT, 4.

COPYHOLD.

See FREEBENCH.

CONTEMPT.

1. A single judge of the Court of Review, when sitting as the Court, has power to commit for contempt.

Whether the Court of Review has jurisdiction to restrain a party whom it has committed for contempt, from suing the party who obtained the order of commitment in an action for false imprisonment, *quære*. *Ex parte Sandau*. Page

2. An order of commitment issued in strictness, to be prefaced by express adjudication that the party complained of is a contemtor; the absence of such adjudication is not a ground for discharge; such an order for irregularity.

It is not irregular to engraft on an order of commitment an order that the party committed pay the costs of his contempt, but if the order extend to charges and expenses as well as costs, to that extent irregular. *Ex parte Van Sandau*. Page

3. Whether the discharge under 48 G. 3. c. 123. of a party detained under process of contempt, on nonpayment of costs under such order, has the effect of clearing him from contempt so as to entitle him to move. *Quære*. *Oldfield v. Colburn*. Page

See APPEAL, 1.

PAU

PAUPER.
PRO CONFESSO.
WAIVER.

CONVERSION OF RESIDUE.

See CONSTRUCTION, IV. 1.

CORPORATION.

The rule that a suit by individual shareholders in an incorporated Company, complaining of an injury to the corporation, cannot be maintained, if it appears that the Plaintiffs have the means of procuring a suit to be instituted in the name of the corporation itself, applies equally whether the subject-matter of complaint be an act or transaction which is merely voidable at the discretion of a majority of shareholders, or an act or transaction absolutely illegal, and incapable of being confirmed by such majority.

The Court will not entertain a bill by shareholders in an incorporated Company, seeking merely to restrain the directors *de facto* from acting as such on the sole ground of the alleged invalidity of their title to their offices.

A general demurrer to a bill by two members of an incorporated railway company, in their individual characters, against the corporation and twelve other members who were alleged to have usurped the office of directors, and

VOL. I.

to be exercising the functions thereof, as a majority of the governing body, injuriously to the interests of the company, praying that those twelve Defendants might be restrained from acting as directors, and might be ordered to deliver the common seal, and the property, and books of the company in their possession, to six other persons, who were alleged to be the only duly constituted directors, was, on both the above grounds, allowed. *Mozley v. Alston.* Page 790.

COSTS.

I. Of Attorney-General.

The taxed costs of the Attorney-General and the Commissioners for the Reduction of the National Debt, upon applications under the 56 G. 3. c. 60., are, as a general rule, to be paid out of the fund recovered. *In re Holland.*

Page 379.

II. Of Cross Bill.

Where the Plaintiff in an original cause, after putting in an answer to a cross bill for discovery, dismisses his own bill before the hearing, the Court has not only no power under the 41st order of August 1841, to give the Plaintiff in the cross bill his costs, but the Defendant to the cross bill has a right to be paid his costs of the answer by the Plaintiff, according

3 I

to

to the old practice. *Westfield v. Shipman*. Page 277

III. Of Official and Provisional Assignees.

1. When the provisional assignee under the Insolvent Act is made a Defendant in that character to a bill of foreclosure, in respect of the equity of redemption, he is not entitled to his costs from the Plaintiff, although he may have received no assets of the insolvent wherewith to pay them. *Appleby v. Duke*. Page 272
2. An official assignee, made Defendant to a foreclosure suit, as representing the interest of a mesne incumbrancer who had become bankrupt, held not to be entitled to his costs from the Plaintiff, although he disclaimed absolutely at the hearing. *Clarke v. Wilmot*. Page 276

IV. Of Short-hand Writer's Notes.

In taxing the costs of a motion for a new trial of an issue, the costs of copies of the short-hand writer's notes of the evidence taken on the former trial are in the discretion of the Taxing Master, regard being had to the nature of the issue and the extent to which such copies, if at all, were necessary, but in no case will more than two copies be allowed. *Malins v. Price*. Page 590

V. Under Railway Acts.

The costs of an application for the transfer out of Court of a

sum of stock, the produce of land taken by a railway company under the powers of their Act from a party under disability, held, upon the construction of the Act, to be payable by the company. *In re Great Western Railway Company*. Page 560

VI. Security for.

1. The surety, for costs, of a plaintiff resident abroad, became bankrupt a few days after the decree dismissing the bill with costs, and before the costs had been taxed under it. The Plaintiff having afterwards presented a petition of rehearing, the Court ordered the proceedings upon it to be stayed until the Plaintiff should have found a new surety. *Lau-tour v. Holcombe*. Page 262
2. Where a Plaintiff is required to give security for costs, it is irregular for his solicitor to be his surety. *Panton v. Labertouche*. Page 265

See ADMINISTRATION SUIT.

APPEAL, 2.

CONTEMPT, 2, 3.

EXCEPTIONS, II.

IMPERTINENCE.

INJUNCTION.

PAUPER.

COURT OF REVIEW.

On the hearing of an appeal upon a special case from the Court of Review, the Lord Chancellor may direct a case to be stated

stated for the opinion of a court of law.

The decision in *Hall v. Smith*, 1 B. & C. 407., questioned. *In re Clarke*. Page 562

See APPEAL, I.

CONTEMPT, I.

COVENANT (TO PRODUCE DOCUMENTS).

The right of a purchaser to a covenant for the production of documents constituting part of his title, does not extend to copies of Court Rolls or indentures of bargain and sale enrolled, unless they are in the possession or power of the vendor.

A purchaser is not entitled as a matter of course to a covenant for the production of all documents contained in the abstract of title, which are not delivered to him, but only of those which are necessary to make out a good sixty years' title. *Cooper v. Emery*. Page 388

CREDITORS' SUIT.

Practice in the Master's office in the proof of bond debts, under a decree in a creditor's suit. *Rundell v. Lord Rivers*. Page 88

See INJUNCTION, II. 1. 2.

CROSS CAUSE.

See COSTS, II.

DEPOSITIONS.

CROWN.

A Petition of Right does not lie to recover compensation from

the Crown for damage to the property of an individual, occasioned by the negligence of the servants of the Crown.

The reigning Sovereign is not liable to make compensation for damage to the property of an individual, occasioned by the negligence of the servants of the Crown in a preceding reign; nor, *semble*, even where such damage has been done in his own reign. *Lord Canterbury v. The Attorney-General*. Page 306

DEMURRER.

I. To Bill.

See PLEADING.

II. To Interrogatories.

If the question raised by the demurrer of a witness to interrogatories be one which the Court can dispose of in that shape, it is bound to do so, and not to reserve the objection to the hearing. *Carpmael v. Powis*. Page 687

See PRIVILEGED COMMUNICATIONS, II.

DEPOSITIONS.

An order made by the Vice-Chancellor for the suppression of depositions, which had been taken in a cross cause, without leave of the Court, after publication had passed in the original cause, and which

related principally, but not exclusively, to matters in issue in the original cause, affirmed upon appeal: the parties, by whom the depositions had been taken, having, in the court below, declined a reference to the Master, to distinguish what parts thereof related to matters not in issue in the original cause, and it being held that they were not entitled, under such circumstances, to have the objection to the evidence reserved to the hearing. *Pascall v. Scott*.

Page 110

DISTRINGAS.

See INJUNCTION, III.

DOCUMENTARY EVIDENCE.

See COVENANT.

EVIDENCE.

REDEMPTION.

TITHES.

DOMICIL.

See GUARDIAN.

LUNATIC.

ELEGIT.

Notwithstanding the stat. 1 & 2 Vict. c. 110., which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his se-

curity against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an *elegit* without notice of the mortgage. *Whitworth v. Gaugain*.

Page 728

ENROLMENT.

I. *Of Decree.*

The enrolment of a decree of a Vice-Chancellor does not require his signature as well as that of the Lord Chancellor.

Semble, the enrolment of an order subsequent to a decree, though it recites the decree, is not *per se* an enrolment of the decree; but held that it equally prevents a rehearing of the decree, at least where the latter cannot be varied without being made inconsistent with the order.

M'Dermott v. Kealy. Page 267

2. The time allowed for enrolling a decree or order is six calendar months from the date thereof. *Man v. Ricketts*. Page 530

II. *Of Letters Patent.*

See PATENT.

EQUITABLE MORTGAGE.

See ELEGIT.

EVASION.

See IRREGULARITY, 1.

EVIDENCE

EVIDENCE.

1. An entry in an old account of burial fees received by the sexton of a large parish, by which he charged himself with the receipt of a certain sum for the burial of one *Joseph Lloyd*, described as "in *Wells Street*," admitted as evidence that a person of that name, who was proved by the parish register of burials to have been buried there on the day on which the entry bore date, resided in *Wells Street*. *Lloyd v. Wait*.

Page 61

2. The 26th section of the 3 & 4 *W. 4. c. 42.*, by which witnesses, who were before incompetent, by reason that the verdict or judgment in the pending action might be used as evidence for or against them in another proceeding, were rendered competent by enacting that such verdict or judgment should not be so used, applies to courts of equity as well as to courts of law. *Oliver v. Latham*.

Page 163

3. The provisions of the 3 & 4 *W. 4. c. 42. ss. 26, 27.*, for removing the incompetency of witnesses, who would otherwise be incompetent by reason that the verdict or judgment in the pending action might be used as evidence for or against them in another proceeding, apply exclusively to courts of law, and have no application to courts of equity. *Oliver v. Latham*.

Page 408

See **STAMP.**

EXAMINATION.

See **PLEADING, 1.**

EXCEPTIONS.

I. *To Answer.*

See **INDULGENCE.**

IRREGULARITY.

PLEADING, I.

II. *To Master's Report.*

On exceptions taken by the Plaintiff to a Master's report, it appearing that a material element of the enquiry had been overlooked by the Master, the Court referred it back to him, to review his report, not allowing or disallowing the exceptions, but ordered the deposit of 10*l.* to be returned, although the omitted enquiry had not been suggested, nor any evidence offered upon it by the Plaintiff before the Master, the Court being of opinion, that, from the nature of the reference, the onus of suggesting such enquiry lay on the Defendant rather than on the Plaintiff. *Milford v. Reynolds*.

Page 706

FRAUD.

See **INJUNCTION, II. 3.**

JURISDICTION, IV.

FREEBENCH.

A surrender by the wife of a copyholder with his consent, and after

3 I 3

having

having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, held effectual to bar her right of freebench, if any such existed by special custom, although at the time of such surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises.

Doctrine as to the operation of fictitious forms of conveyance.
Wood v. Lambirth. Page 8

GAMING.

Gambling debts contracted in this country, as well as the securities given for them, are void, and cannot be recovered. But money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the courts of this country. And, therefore, where an unascertained portion of a balance of account, for which an I. O. U. had been given, was admitted to consist of money lent for the purpose of playing at public tables in *Germany*, but it did not appear that the games played at such tables were forbidden by the laws of that country; the Court, on appeal, dissolved an injunction which had been granted to restrain an action brought to recover

the whole balance. *Quarrier v. Colston.* Page 147

GENERAL ORDERS.

XVII. 23d Nov. 1831.

Where a Plaintiff obtains an order for a commission to examine witnesses, and serves it upon the Defendant, his subsequent abandonment of such order will not withdraw the case from the operation of the 17th amended Order of 1831. *Hinton v. Lewis.* Page 459

X. December, 1833.

Under the 10th Order of December, 1833, the common injunction cannot be obtained until the ninth day after the day of the Defendant's appearance. *Stanley v. Bond.* Page 103

XXXIX. Aug. 1841.

1. The Court will allow a cause to be set down upon a Defendant's objection for want of parties, notwithstanding the fourteen days limited for that purpose by the 39th Order of August, 1841, have expired, when the delay is satisfactorily accounted for. *Kershaw v. Clegg.* Page 120
2. The time limited by the 39th Order of August, 1841, for setting down a cause for argument upon an objection for want of parties, cannot be enlarged except by consent. *Calvert v. Gandy.* Page 518

XLI. August, 1841.

See Costs, 11.

LXVIII.

LXVIII. May, 1845.

All applications for leave to amend under the 68th Order of *May*, 1845, are to be made in the first instance to the Master.

Where the General Orders require an affidavit of the solicitor, an affidavit of the solicitor's clerk is not sufficient; but in cases where the facts to be deposed to are within the personal knowledge of the clerk only, the Court may require an affidavit from both. *Christ's Hospital v. Grainger.*

Page 634

LXVI. and LXVIII. May, 1845.

The last of several answers in the 66th Order of *May*, 1845, and the last answer in the 68th Order mean the last answer that is required to be put in before a replication can be filed. *Arnold v. Arnold.*

Page 805

GRAMMAR SCHOOL.

1. In settling a scheme for a grammar school, where the head-master is to be a graduate of *Oxford* or *Cambridge*, and in holy orders, the Court will give no specific directions as to religious instruction or discipline, but will leave the details of both to the discretion of the head-master.

Restrictions imposed on the master of a Free Grammar School as to holding ecclesiastical preferment. *In re the King's Grammar School.*

Page 564

2. By the statutes of a free grammar school founded at *Manchester*

in the reign of *Henry VIII.*, it was provided that a high master and usher should be appointed, with certain stipends payable out of the revenue of the charity, who were to teach freely and indifferently any male child who should come to the school from whatever county or shire without any money or other reward whatever, except only the said stipends — one of which scholars was to be appointed by the head-master to teach the infant scholars (infantes) their A, B, C, primer and sorts till they began grammar. The surplus income of the charity, when it exceeded a certain sum, which was to be kept as a reserve, was to be applied in exhibitions for the scholars at the Universities of *Oxford* and *Cambridge*. Vacancies in the body of trustees, who were twelve in number, were to be filled up from among "honest men of the parish of *Manchester*;" and there was a power to the trustees for the time being to augment, expound, and reform all such of the original statutes as concerned the schoolmaster, usher, and scholars. The revenue of the charity having of late years greatly increased, and an information having been filed for a new scheme, it appeared that for upwards of a century past some of the trustees had been elected from adjacent parishes and counties; and that for a like period the two masters had been allowed to take boarders, who had participated indiscriminately

minately with the other scholars in the exhibitions and other benefits of the charity. The trustees had also sanctioned a regulation, by which boys under six years of age, and unable to read, were excluded from the school.

By the decree of Lord Chancellor *Cottenham*, it was referred to the Master to settle a scheme with the following declarations.

1. That in future appointments of trustees regard was to be had to the qualifications required by the statutes. 2. That all boys who were of an age to be capable of receiving instruction were to be admitted. 3. That boarders were not in future to be eligible to exhibitions, or to derive any benefit from the funds of the charity in any manner by which the expenditure of such funds might be increased.

On a rehearing before Lord Chancellor *Lyndhurst*, it was held that there was no ground for excluding boarders from the benefit of the charity. The third declaration was accordingly struck out, and in lieu of it a reference directed to the Master to inquire on what conditions, and subject to what restrictions, the masters were to be allowed to receive boarders in their houses. *Attorney-General v. The Earl of Stamford*.

Page 737

GUARDIAN.

Although the Court will sometimes appoint a guardian to an infant

without a reference, where no objection is made to the individual proposed, it will in no case dispense with a reference where the guardianship is contested between two parties.

Four persons domiciled and resident in *Scotland* had accepted the trusts of a *Scotch* deed, attested by two witnesses, by which they were duly appointed tutors and curators to a *Scottish* orphan child, whose only property consisted of real estates situated in *Scotland*. The child having come to reside in *England* for the sake of its health, and a suit having been instituted by other parties in its name, for the purpose of making it a ward of this Court: Held, on the construction of the deed, that it appeared to be made in contemplation of the child's continuing to reside in *Scotland*, and with reference solely to her so doing; and the care and custody of the child being considered to be, therefore, unprovided for, and the curators who, under the deed, had the management of the property, being parties, and having appeared, to the suit, the Lord Chancellor referred it to the Master to approve of a scheme for the residence of the child, and to appoint guardians. *Beattie v. Johnstone*.

Page 17

HABEAS CORPUS.

See PRO CONFESSO.

HEIR

HEIR.

See ISSUE.

PLEADING, III. 1.

IMPERTINENCE.

In an information seeking to set aside a deed alleged to have been executed in fraud of proceedings under an outlawry, Held not impertinent to state that at the time of the execution of the deed the outlaw was residing at *Holyrood* to avoid his creditors, or that his object in executing the deed was to delay and defeat his creditors.

Though it is not necessary that the Relator in an information should have an interest in the subject of the suit, yet a statement of only a few lines, shewing what interest the Relator had, was held mere surplusage and not impertinence.

Where the Master and the Court below had come to different conclusions upon exceptions for impertinence, the Lord Chancellor, in affirming the decision of the Court below, gave no costs of the appeal. *Attorney-General v. Richards*. Page 383

INCONSISTENCY IN DECREES.

See CHARITY, 3.

NEXT OF KIN.

PLEADING, II. 2.

INDULGENCE.

Leave given, under particular circumstances, to a Defendant whose answer had been reported insufficient, to set down exceptions to the report for argument, notwithstanding he had been served with an order giving the Plaintiff leave to amend, and requiring the Defendant to answer the exceptions and amendments together. *Zulueta v. Ardouin*. Page 368

INFANT.

See GUARDIAN.

MAINTENANCE.

INJUNCTION.

I. Common.

See GENERAL ORDERS.

LONG VACATION.

II. Special.

1. After the usual decree has been obtained in a creditors' suit against the real and personal representative of an intestate, this Court will restrain all further proceedings in an action by a bond creditor of the intestate against the heir, although the heir may have pleaded *riens per descent*, and issue may have been joined on such plea; and as the heir will be ordered to pay to the creditor his costs of the action up to the time when he had first notice of the decree, any delay in applying for the injunction will, in most cases, resolve itself into a question of costs. *Rouse v. Jones*. Page 462

2. After

2. After the usual decree has been obtained in a creditor's suit, this Court will stay all further proceedings in an action by a creditor against the executor upon payment to the creditor of his costs of the action up to the time when he had first notice of the decree, although the executor may have pleaded *plene administravit*, and issue may have been joined on such plea. *Vernon v. Thellusson*.

Page 466

3. An injunction granted on a suggestion of fraud, to restrain a party resident in *England* from prosecuting a suit in the Court of Session in *Scotland*, to enforce a legal security against lands situate in that country, was on appeal dissolved, on the ground that, although the remedy afforded by this Court in cases of fraud was more effectual and complete than in the *Scotch* Court, the question between the parties in this case might, upon the whole, be more conveniently litigated, and with a more conclusive result, there than here. *Jones v. Geddes*.

Page 724

III. Under 5 Vict. c. 5.

1. *Semble*, that the remedies given by the fourth and fifth sections of the 5 Vict. c. 5. are cumulative; and consequently, that a party, who has sued out a *distringas* under the fifth section, is not thereby precluded from afterwards applying for an injunction under the fourth section. *Ex parte The Marq. of Hertford*.

Page 129

2. The remedies given by the fourth and fifth sections of 5 Vict. c. 5. are in substitution for the writ of *distringas* under the former practice in the Exchequer; and therefore, where a party had put a *distringas* upon a sum of stock, before the passing of that Act, and that *distringas* had been removed upon the usual notice, Held, that it was not competent to him, after the passing of the Act, to apply for an injunction under the fourth section of it. *Ex parte Amyot*.

Page 130. (n.)

IV. In Bankruptcy.

See CONTEMPT, I.

INQUISITION (OF LUNACY).

An application by a mortgagee of an alleged lunatic's estate to be allowed to attend by counsel at the inquisition, refused, the applicant declining to be bound by the result of the proceedings. *In Re Watts*.

Page 512

IRISH MORTGAGES.

Under the 4 & 5 W. 4. c. 29., a trust to invest money in real securities in *England* or *Wales* or *Great Britain*, will authorize an investment on real securities in *Ireland* also; and though the money be already invested in *Great Britain*, the Court will, on the application of the tenant for life of the fund, direct a reference to the Master to inquire whether it will be for the benefit of all parties interested that

that the investment should be changed for one at a higher rate of interest in *Ireland*. *Ex parte Lord William Pawlett*. Page 570.

IRREGULARITY.

1. An order obtained *ex parte* under circumstances which render it an evasion of the General Orders, is not necessarily on that account irregular. *Arnold v. Arnold*.

Page 805

2. Where a Plaintiff has obtained an order referring exceptions to the answer, within six days after the expiration of the eight days allowed to the Defendant for submitting to them, but has neglected to serve it until after the expiration of the six days, the order is merely useless, but not irregular, and the proper course for the Defendant is not to move to discharge the order, but to take the objection before the Master. *Dalton v. Hayter*.

Page 515

See LIS PENDENS.

PRO CONFESSO.

WAIVER, 2.

ISSUE (FOR TRIAL).

See REDEMPTION.

JOINT STOCK COMPANY.

See CORPORATION.

PLEADING, III. 3. 4.

JOURNEY'S ACCOUNTS.

Semble, stat. 3 & 4 W. 4. c. 27. s. 36. has abolished the doctrine of

journey's accounts as applied to writs of writ sued after 31st Dec. 1834.

Semble, an action cannot be continued by journey's accounts where it has abated by the death of a sole Defendant, any more than where it has abated by the death of a sole Plaintiff. *Davies v. Lowndes*. Page 328

JURISDICTION.

I. Over Foreign Infants.

See GUARDIAN.

II. Over Patents.

See PATENT.

III. Over Lunatics not found such by Inquisition.

The property of a lunatic, not found such by inquisition, consisted of the sums of 4252*l.* Bank 5 *per cent.* annuities, and about 906*l.* cash, standing to his account in a cause to which he was a party, and some freehold property of the value of about 7*l.* per annum. A petition presented in the cause for the application of the income of the property to the maintenance of the lunatic, with a view to save the expense of a commission, was dismissed. *Gilbee v. Gilbee*. Page 121

IV. Over Wills of Personal Estate in Matters of Fraud.

A testator having by his will bequeathed a legacy to the Plaintiff, and made S. E. his residuary legatee, executed several codicils, by which he gave to the Plaintiff further legacies, and one fourth share of

of his residuary estate. He afterwards executed another codicil, by which he revoked all former bequests to the Plaintiff, giving him a small annuity in lieu thereof, and at the same time made a reduction in legacies which he had previously given to some of the Plaintiff's relations. The will and all the codicils having, after litigation in the Ecclesiastical Court, been admitted to probate, the Plaintiff filed his bill, alleging that the testator had been induced to execute the last codicil solely through certain false and fraudulent representations which had been made against his (the Plaintiff's) character at the instance of *S. E.*, and that in the Ecclesiastical Court he had not been permitted to take any objections to that codicil, except such as went to the validity of the whole instrument, and praying therefore that the executors or *S. E.* might be declared trustees for him to the amount of the bequests revoked by that codicil. Held, upon demurrer, reversing the decision below, that the Court had no jurisdiction to entertain the bill. *Allen v. Macpherson.* Page 133

V. Over Officers of the Court.

Any solicitor of the Court has a right to complain by petition of an irregularity in the conduct of business in the Masters' offices, and on such irregularity being shewn to exist, the Lord Chancellor may interfere to correct it,

though no actual evil be proved to have resulted from it. *Case of The Masters' Clerks.* Page 65

See CONTEMPT, 1.

LUNATIC, 1.

LEAVE TO ATTEND.

See INQUISITION.

LEGACY.

See REVOCATION.

LEGACY DUTY.

A testator devised certain estate to the use of trustees for the term of 500 years, and subject thereto to the use of other trustees, to preserve contingent remainders with remainder to the first and other sons of *C. S.* (then an infant) with divers remainders over; and he directed that the trustees of the term should, after paying certain annuities, apply so much of the rents and profits of the estate as they should think fit (not exceeding in any one year a certain amount), in aid of another fund to the maintenance and education of *C. S.*, until she should attain twenty-one or marry, and that they should accumulate the surplus plus rents and profits for the benefit of *C. S.* when she should attain twenty-one or marry, and

sh

she should die under twenty-one and unmarried, then for the benefit of the parties entitled under the subsequent limitations of the estates, and that upon her attaining twenty-one or marrying, they should, during her lifetime, pay the surplus rents, after payment of the annuities, to her for her separate use.

Held, that the sums annually applied out of the rents and profits, under the trusts of the term, to the maintenance and education of C. S. until her marriage were not liable to legacy duty. *Shirley v. Earl Ferrers.* Page 167

LIEN.

See COMPOSITION DEED.

LIMITATIONS (STAT. OF).

In the case of a legal demand, a Court of Equity acts in obedience, and not merely by analogy, to the Statute of Limitations.

A banking firm, who, on opening an account with a customer had agreed to allow him interest at 3 per cent. on the balances which should from time to time be standing to his credit, set up the Statute of Limitations as a defence to a bill filed against them, by the customer, for an account. The account, as it stood in the bankers' book, shewed a considerable balance due to the Plaintiff, but there being no item in it, or evidence of any transaction connected with it,

of a date within six years prior to the filing of the bill, nor any suggestion in the bill, that the bankers were bound, by the agreement or otherwise, to have actually entered the interest as it became due to the credit of the customer in the account, or that they had omitted so to do with a fraudulent intent, the defence was allowed to prevail. *Foley v. Hill.* Page 399

See JOURNEY'S ACCOUNTS.
PLEADING, II. 1.

LIS PENDENS (PLEA OF).

It is irregular to reply to a plea of the pendency of a former suit for the same matter, the proper course being to obtain a reference of the plea to the Master. *Jones v. Seguirra.* Page 82

LONG VACATION.

The common injunction may be dissolved in the long vacation. *Lane v. Barton.* Page 363

LUNATIC.

1. A commission of lunacy may issue against an alien.

The domicil of the party against whom a commission of lunacy is applied for, is not material to the question of jurisdiction, though it may be material to the question of discretion, if, for instance, the party has come here for a short time or for a particular pur-

purpose. *In re Princess Bariatinsky.* Page 375

2. *Semble*, a petition to supersede a commission of lunacy will not be entertained unless the lunatic be either personally present in Court, or at least in such a situation as that he may be personally examined by the Lord Chancellor or some one under his authority.

Whether if a party who has been found lunatic escapes to a foreign country, and while resident there is pronounced by a competent tribunal to be of sound mind, the Lord Chancellor will give such credit to that decision as to entertain a petition by the party to supersede the commission, without requiring him first to return to the jurisdiction for the purpose of being personally examined, *Quære?* *In re Dyce Sombre.* Page 436

3. Leave given for a lunatic, under particular circumstances, to reside in *Scotland*, his committee, who resided in *England*, undertaking to bring him within the jurisdiction, whenever it should be required. *In re Jones.* Page 461

See INQUISITION.

JURISDICTION, III.

PARTNERSHIP.

RIGHT TO BEGIN, 2, 3.

MAINTENANCE (PAST).

The allowance to which a mother who has maintained her orphan

child is entitled, after the death of the child, out of the accumulations of its fortune, is limited to what she has actually expended upon such maintenance, though such expenditure should have been less than the amount of the child's fortune would have justified; and the allowance ought to be paid out of that part of the child's fortune which it would have been most for the benefit of the child, if living, to have been applied for that purpose. *Brace v. Knott.* Page 5

MARRIED WOMAN.

See ANTICIPATION CLAUSE.
FREEBENCH.

MASTERS' CLERKS.

Though the respective duties of the Masters' chief clerk and copying clerk are nowhere exactly defined, they are sufficiently distinguished in their general features by the provisions of the Chancery Regulation Act relating to those officers, as well as by previous practice. And the Masters are not at liberty to distribute the business of their offices between their two clerks in such a manner as habitually to allot to the copying clerk duties which is to be inferred from that Act were intended to be exclusively performed by the chief clerk, although with proper limitations and on proper occasions the Masters are entitled to require either of the clerks

clerks to perform any official duty in which his assistance may be required, and for the performance of which he may be competent.

Case of the Masters' Clerks.

Page 650

MISJOINDER.

Dismissal of bill at the hearing, on the ground of misjoinder of Plaintiffs and of subject matters of suit affirmed on appeal. *Anderson v. Wallis.*

Page 202

MISNOMER (OF DEVISEE).

See CONSTRUCTION, IV. 3.

MODUS.

See TITHE.

MORTGAGE.

See BANKRUPT, 1 & 2.

ELEGIT.

REDEMPTION.

MOTIONS OF COURSE.

All motions of course may be made out of term, as well as in term, on any day, whether a seal day or not. *Lord Harborough v. Wartenaby.*

Page 364

NEGLECT.

See ADMINISTRATION SUIT.

STATUTES.

NEXT OF KIN.

If the sentence of an Ecclesiastical Court in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in this Court between the same parties for distribution.

Barrs v. Jackson.

Page 582

See PLEADING, 3.

NOTICE.

Upon an assignment of an outstanding mortgage term, in consideration of a further advance, the assignee was informed that a settlement had been made upon the marriage of the mortgagor, but was assured by him and his wife that it related only to the fortune of the wife, and did not include the mortgaged estate, although in fact it did. Upon a bill filed by the eldest son of the marriage, who was tenant in tail under the settlement, Held, that the assignee of the term was not affected with notice of the settlement, it appearing from the Plaintiff's own evidence, that the assignee had really believed the representation so made to him to be true. *Jones v. Smith.*

Page 244

See BANKRUPT, 2.

OBJEC-

OBJECTION (FOR WANT OF PARTIES).

See GENERAL ORDERS.
RIGHT TO BEGIN.

OFFICIAL ASSIGNEES.

The creditors' assignee and the official assignee have by the 1 & 2 W. 4. c. 56. s. 25. a joint title to the bankrupt's estate, so that if one of them die pending a suit in which they are Co-plaintiffs, the suit may be continued by the other.

The 67th section of the 6 G. 4. c. 16., which provides that a suit shall not abate by the death or removal of an assignee, but that it shall be prosecuted in the name of the assignee "chosen" in his place, applies, since the incorporation of that act with the 1 & 2 W. 4. c. 56., to official assignees as well as to creditors' assignees.
Man v. Ricketts. Page 617

See COSTS, 3.

ORDER AND DISPOSITION.

See BANKRUPT, 3.

ORDERS OF COURSE.

See IRREGULARITY.
MOTIONS OF COURSE.

PARTNERSHIP.

On a bill to dissolve a partnership, on the ground of the lunacy of a partner, the Court will not make

its decree retrospective, even to the filing of the bill, still less to the time when the Defendant first became incapable of attending to the business. *Besch v. Frolich.*

Page 172

See PLEADING, III. 2.

PATENT.

Where letters patent for an invention, and the enrolment, contain the same error, the Master of the Rolls has no authority to order the enrolment to be amended, until a corresponding amendment has been made in the letters patent and they have been resealed.

An application having been made to the Crown for the grant of a patent for an invention of machinery for *covering* fibrous substances, &c., and the Solicitor-General having certified in favour of such grant, the invention was, by a mistake of the copying clerk in the Home Office, misdescribed in the Queen's warrant, by inserting the word "recovering," for the word "covering;" and the error was adopted, without being observed, in the Queen's bill, the Privy Seal bill, and the letters patent. After the letters patent had been enrolled, the error was discovered, and the patentee having procured the Queen's warrant, the Queen's bill, and the Privy Seal bill to be duly amended by the proper officers of the Crown, presented a petition to the Master of the Rolls, as keeper of the public records, praying that the enrolment

ment might be made to accord with the Privy Seal bill as so amended. And the Master of the Rolls made an order accordingly. But, upon an appeal to the Lord Chancellor by a party, against whom the patentee had previously commenced an action for the infringement of the patent, Held, that the enrolment could on no account be allowed to represent what the letters patent did not contain; and the appeal petition was directed to stand over, with liberty to the patentee to make such application to the Lord Chancellor as he should be advised. An application was accordingly made for the amendment of the letters patent, but the Lord Chancellor refused to entertain it, unless upon the terms of the patentee's paying all the costs of the proceedings then pending against the party alleged to have infringed the patent, and undertaking not to commence any new proceedings for past infringement; which terms having been declined, a joint order was made by the Lord Chancellor and the Master of the Rolls, by which the previous order of the Master of the Rolls was discharged, and the enrolment, which had in the meantime been amended pursuant to that order, was directed to be restored to its original state. *In re Nickel's Patent.* Page 36

PAUPER.

I. *Plaintiff.*

A party admitted to sue *in formâ pauperis* after the commencement of a suit may be attached for non-payment of costs which have been previously ordered to be paid in that suit, without being first dispaupered. *Davenport v. Davenport.* Page 124

II. *Defendant.*

An application by a party sued as executor, for leave to defend the suit, *in formâ pauperis*, refused, though, in addition to the usual affidavit, he swore that he had been prevented by an injunction from receiving any assets, and *semble*, the result would have been the same if he had sworn that there were no assets.

Semble, a party who is in contempt for nonpayment of costs in the suit, is not thereby prevented from moving for leave to defend it *in formâ pauperis*. *Oldfield v. Cobbett.* Page 613

PETITION OF RIGHT.

See CROWN.

PLEA.

See LIS PENDENS.

PLEADING.

I. *Answer.*

1. Where a defendant is interrogated as to the contents of the books of a company in which he is a partner, and the question is one which he is bound to answer

if he can, it is no excuse for not answering, to say, that the books are in the custody of the officer of the company, and that his partners will not allow him access to them. If he has a right to inspect the documents, he is bound to enforce that right, and the Court will give him time for that purpose. *Taylor v. Rundell.*

Page 222

2. The rule that a defendant who answers is bound to answer fully, is not affected by the decision in *Adams v. Fisher. Lancaster v. Evors.*

Page 349

II. *Bill.*

1. *Of Revivor and Supplement.*

If, after a demurrer has been put in to a bill, the suit becomes abated, the bill filed to revive it must be limited to that object; if it prays any further or additional relief, a demurrer lies to the whole bill, and not to that part only which relates to such additional relief. *Bampton v. Birchall.*

Page 568

2. *Supplemental Bill of Review.*

The province of a supplemental bill in aid of a decree is merely to carry out and give fuller effect to that decree, and not to obtain relief of a different kind, and on a different principle; the latter being the province of a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of the Court. And therefore, where, in a suit for the execution

of the trusts of a will, the original bill had prayed, and the decree had directed, merely the common accounts against the executors, and the Plaintiff afterwards filed a supplemental bill, without the leave of the Court, alleging that in taking the accounts in the Master's office he had discovered for the first time that the executors had been guilty of misconduct, and praying relief against them in respect of their wilful neglect and default; the supplemental bill was ordered to be taken off the file for irregularity.

Where a bill, which was in part a supplemental bill in the nature of a bill of review, and in part a bill of revivor, had been filed without leave of the Court; the whole was ordered to be taken off the file, although, as a mere bill of revivor, it would have been regularly filed without leave. *Hodson v. Ball.*

Page 177

III. *Parties.*

1. To a suit by the personal representative of a vendor of real estate for specific performance of the contract of sale, the real representative of the vendor is a necessary party. *Roberts v. Marchant.* 370
2. A Defendant to a suit for winding up a partnership has a right to insist that the suit shall be so constituted as that the decree may be binding on all the parties to the partnership contract; and, therefore, a bill by one against another

another of five partners in a joint speculation, for an account and payment of the Defendant's contributory share of an alleged loss on the winding up of the concern, was held to be defective as to parties, although it was alleged and proved that the Plaintiff had, as managing partner, made all the advances himself, and that he had settled with and released the other copartners; and it was held that an undertaking by the Plaintiff, to bear any liability which, on taking the accounts, might appear to subsist against the absent partners in favour of the Defendant, would not cure the defect.

Hills v. Nash. Page 594

3. A member of the provisional committee of an abandoned railway scheme, against whom an action had been brought by a creditor, who was alleged to be also a member of the committee, filed a bill on behalf of himself and all other persons interested as partners in the company, except the Defendants, (who consisted of the Plaintiff in the action and nine other members of the committee), stating that no shares had ever been allotted, but that various sums had been contributed by several members of the committee, (whose names the Plaintiff did not know,) pursuant to a resolution of their board, in trust for the liquidation of the liabilities of the company, and that the Defendants had received those sums and also other pro-

perty of the company, and were misapplying them; and praying that the same might be properly applied in discharge of the liabilities of the company, the Plaintiff being willing to pay his due proportion, and that the outstanding property of the company might be got in and that the action might be restrained. Held (reversing the decision below), that as the alleged contributions appeared to be purely voluntary the Plaintiff had no right to interfere with or ask any relief in respect of them, at all events in the absence of the parties by whom they had been made, and a demurrer for want of parties was on that ground allowed. *Sharp v. Day.* Page 771

4. A bill may be filed against the directors of a provisionally registered railway company, after its dissolution, by some of the shareholders on behalf of all except those defendants, for the winding up of its affairs, though the bill prays not only the collection of the joint property and its application in discharge of the joint liabilities, but also the distribution of the surplus among the shareholders in proportion to the amount of their respective subscriptions.

In a bill filed against the directors of a provisionally registered railway company by some of the shareholders, on behalf of all except the Defendants, for the winding up of its affairs, after stating that a certain number of persons

had executed the parliamentary contract as subscribers for certain shares, but that they had not paid their deposits, and that no shares or certificates of shares had been issued to them, it was alleged that the Plaintiffs were ignorant of their names and addresses. Held, on demurrer for want of parties, that that allegation was a sufficient excuse for not making those persons Defendants, although the Standing Orders required that a copy of the parliamentary contract containing the names and addresses of all persons who had executed it should be deposited in the Private Bill Office, and it appeared from statements in the bill that that document had been deposited pursuant to the Standing Orders, and that the Plaintiffs had procured a copy of it.

- Where a bill by certain persons, on behalf of themselves and others, for relief against an alleged breach of trust, is demurred to, on the ground that some of the parties, on whose behalf the Plaintiffs profess to sue, appear to have been implicated in the transaction complained of, the proper test of such objection is to see whether the bill states facts with respect to those parties, which, as against them, would amount to a defence to the suit. *Apperly v. Page*. Page 779
5. When property is settled in trust, in remainder, for the persons who should be the next of kin of the tenant for life at his death, the presumptive next of kin are not

necessary parties to a suit instituted for the execution of the trusts during the lifetime of the tenant for life. *Fowler v. James*.

Page 803

See PURCHASE MONEY.

POLICY OF INSURANCE.

See BANKRUPT, 2.

POOR RATE.

See CHARITY, 3.

POSSIBILITY.

See VOLUNTARY SETTLEMENT, 2.

POWER OF APPOINTMENT.

See CONSTRUCTION, II.

PRIORITY.

See ELEGIT.

PRIVILEGED COMMUNICATIONS.

- I. *Between a Party or his Agent and his Professional Adviser.*
1. Where an attorney is employed by a client professionally, to transact professional business, all the communications which pass between them in the course, and for the purpose of that business, and not those only which relate to litigation commenced or in contemplation, are privileged communications. *Herring v. Cloberry*.
Page 91
 2. *R.*, a solicitor, having taken a mortgage upon the property of *P.* in his own name, but really on behalf

behalf of certain clients, by whom he had been confidentially employed to procure investments for their money, and having also been employed at different times in effecting mortgages upon parts of the same property for other clients who had taken the securities in their own names: Held, on a bill being filed against *R.* and *P.* by a judgment creditor of the latter, to redeem the mortgaged premises, that *R.* was not bound to disclose the names either of the *cestuis que trust* of the mortgage to himself, or of the parties by whom he had been employed in the other mortgages. *Jones v. Pugh.* Page 96

3. Letters written or cases stated for the opinion of counsel by a party or his solicitor, with a view to a suit then in contemplation, are privileged from production, not only in that suit but in any subsequent litigation with third parties respecting the same subject matter, and involving the question to which such letters, &c. relate. *Holmes v. Baddeley.* Page 476

II. *Between a Party or his Solicitor and his Agent.*

1. Where the circumstances of the case render it necessary for a party or his solicitor to employ an agent to collect evidence in support of legal proceedings, the communications of such agent to his principal relating to such evidence are privileged. *Steele v. Stewart.* Page 471
2. The privilege of communications

between solicitor and client extends to all matters within the scope of the ordinary duties of a solicitor, and the sale of estates being one of such matters, it was held that a solicitor was not at liberty to disclose what had passed in conversations which he had had either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale.

But, *semble*, if the agent had been examined he would have been bound to answer. *Carpmael v. Powis.* Page 687

III. *Government Officers.*

A correspondence having passed between the Court of Directors of the *East India Company* and the Commissioners for the Affairs of *India*, (in pursuance of the requisitions of the stat. 3 & 4 *W.* 4. c. 85.) relating to a dispute which had arisen with respect to a commercial transaction in which the company had been engaged with a third party: Held, that the correspondence was, on the ground of public policy, a privileged communication, and, consequently, that the company were not bound to produce, or set forth the contents of it in answer to a bill of discovery filed against them by such third party, in relation to the transaction to which it referred. *Smith v. The East India Company.* Page 50

PRO CONFESSO.

1. A Defendant in custody under process of contempt for not appearing or not answering may be brought up so as to satisfy the 5th Rule of 1 *W. 4. c. 36. s. 15.*, during vacation, provided it be within the period pointed out by that rule for the purpose. *Clark v. Clark.* Page 116

2. A *habeas* was issued under the usual order to bring up a Defendant in contempt, for the purpose of a motion to take the bill *pro confesso* against him; on his being brought up the motion was refused with costs, but that decision was reversed on appeal, and a new *habeas* was afterwards issued under the same order for the purpose of a renewal of the motion. Held, that the second *habeas* was regularly issued without a new order for it, on the ground that, owing to a mistake of the Court, the original order had not been satisfied by the first *habeas*.

Where a bill against several Defendants has been taken *pro confesso* against one, the clerk of records attending for that purpose with the record, it is not the practice to require the clerk's attendance a second time on the hearing of the cause against the other Defendants.

Under the 5th Rule of 11 *G. 4. & 1 W. 4. c. 36. s. 15.*, if the thirty days therein mentioned expire out of term, the Defendant may be brought up to the bar of

the Court at any time during the vacation, without waiting for the four first days of the following term. *Needham v. Needham.*

Page 640

PRODUCTION OF DOCUMENTS.

1. It makes no difference in the principles upon which the Court deals with a motion for the production of documents, that the bill is filed for discovery in aid of the Plaintiff's defence to an action, and that the case made by it consists not in the assertion of an affirmative title in the Plaintiff, but solely in the suggestion of specific defects in the legal title of the Defendant. *Smith v. Duke of Beaufort.* Page 209

2. Under the usual order for the production of books, &c., with liberty to seal up on affidavit such parts as did not relate to the matters in question, the Defendants had produced a book with certain pages sealed up, and had made the required affidavit. The Plaintiffs afterwards on an affidavit of facts leading strongly to the inference that one of the pages sealed up did relate to the question in dispute, moved that the Defendants might produce the book unsealed; but the motion was refused, although the Defendants declined to answer the affidavit. *Sheffield Canal Company v. Sheffield and Rotherham Railway Company.*

Page 484

3. Where

3. Where a motion for production of documents was resisted on the ground that the answer contained no admission of the Plaintiff's title, which title depended solely on whether *A.B.* had died before or after a certain day; and the answer admitted that the documents in question related to the matters mentioned in the bill, "except the question of the death of *A.B.*:" Held, that this was not a sufficiently distinct denial that they related to the Plaintiff's title to protect them from production. *Edwards v. Jones.* Page 501

4. A statement in an answer that certain documents admitted to be in the Defendant's possession, form part of the evidence of his title, and do not form part of the title of the Plaintiff, to the premises in question, is not sufficient to protect them from production on motion, if they be in their nature such as may furnish evidence in support of the Plaintiff's case, and the answer does not distinctly deny that they do.

Semble, a Defendant who has answered cannot resist a motion for production of documents referred to in his answer, on the ground that the bill is open to a general demurrer for want of Equity. *Marquis of Bute v. Glamorganshire Canal Company.*

Page 681

See AFFIDAVIT, II.

PRIVILEGED COMMUNICATIONS.

PROTECTOR OF SETTLEMENT.

On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement. *In re Wainwright.* Page 258

PROVISIONAL ASSIGNEES.

See COSTS, III.

PROVISIONAL DIRECTORS.

See PLEADING, III. 3, 4.

PURCHASE MONEY.

The rule which relieves a purchaser from seeing to the application of the purchase-money, when the estate is subject to a primary general charge of debts, has reference to the time of the testator's death, and does not cease to be applicable, though the debts be subsequently paid; and therefore where an estate so charged was sold by the trustee, it was held that the *cestuis que trust* were not necessary parties to the conveyance, though the sale did not take place till twenty-five years after the testator's death, and the vendor, on being asked by the purchaser whether all the debts were not paid, had refused to answer the question. *Forbes v. Peacock.*

Page 717

QUASHING WRITS.

Where the objection to the legality of an original writ is one which may be taken upon the pleadings, and so be made the subject of an appeal, the Court will not quash the writ upon motion, unless it is satisfied, beyond all doubt, of the validity of the objection. *Davies v. Lowndes.* Page 328

READY MONEY.

See CONSTRUCTION, III. 5.

RECOGNIZANCE.

The sureties in a committee's recognizance, the condition of which was that the committee should obey the orders of the Lord Chancellor with respect to the lunatic's estate, held liable on the default of the committee, not only for the balance reported due from him on his accounts, but also for the costs of proceedings subsequently taken against him for the purpose of enforcing payment of such balance, although the sureties had no notice of the default of their principal until after those proceedings had been taken. *In re Lockey.* Page 509

REDEMPTION.

A suit for the redemption of a mortgage having been instituted by a party claiming as heir-at-law of the mortgagor, who had died in-

testate, against a party who also claimed to be the heir-at-law, and who had got possession of the estate by obtaining an assignment of the mortgage term after notice of the plaintiff's claim; the Court, at the hearing, made an immediate decree for redemption, refusing the Defendant an issue to try the Plaintiff's title, although it depended upon a long and complicated pedigree, the pedigree being established to the satisfaction of the Court by documentary evidence, and the Defendant having entered into no evidence in support of his own claim to the heirship.

Seemle, that the Court would have in like manner refused an issue, had the Plaintiff made out only a *prima facie* case in support of his title, inasmuch as the Defendant, having obtained possession as mortgagee, was, in this suit, to be considered as filling that character only, and a decree against him in that character would not preclude him from asserting his title as heir-at-law in another proceeding.

In a suit for redemption by the heir of a mortgagor against the assignee of the mortgagee, who was also the personal representative of the mortgagor, the Court, besides the usual decree for redemption, declared the Plaintiff entitled to have the balance which should be found due from him, and which should be paid by him to the Defendant, in respect of the

the mortgage debt, interest, and costs of the redemption, repaid to him out of the personal estate of the mortgagor in a due course of administration, and decreed accordingly, the bill being properly framed with a view to such relief. *Lloyd v. Wait.* Page 61

REFERENCE.

See GUARDIAN, I.

REHEARING.

The rule that there cannot be a second rehearing of a cause before the Lord Chancellor without a special order, applies equally whether the first rehearing is a reversal or an affirmance of the decree or order of the Court below. *Moss v. Baldock.* Page 118

On an appeal from an order allowing exceptions to a Master's report, those parties only are entitled to be heard who were heard in the Court below. *Attorney-General v. Potter.* Page 492

See CHARITY, 3.

REPLICATION.

See LIS PENDENS.
WAIVER, 1.

REVIEW.

See PLEADING, II. 2.

REVIVOR.

Where one of several Defendants died pending their joint appeal to

the House of Lords, and the House of Lords having admitted his representatives, on their petition, as parties to the appeal, eventually made an order varying the decree below, and dismissing the bill as against the Defendant with costs. Held that that order might be made an order of the Court below without first reviving the suit. *Thorpe v. Mattingley.* Page 200

See OFFICIAL ASSIGNEE.
PLEADING, II. 1, 2.

REVOCATION.

A testator drew two cheques on his banker in favour of two of his servants, with a direction that they should be presented after his death, and about a year afterwards made a formal will, in which amongst other dispositions he gave two annuities to the same persons, and all the residue of his personal estate to certain other persons, and revoked all former wills. After his death all the three instruments were admitted to probate as constituting his last will. Held, that by reason of the probate this Court was bound to treat the sums for which the cheques were drawn as legacies, but that as such they were constructively, if not expressly, revoked by the will. *Walsh v. Gladstone.* Page 294

See JURISDICTION, IV.

RIGHTS

RIGHT TO BEGIN.

1. The only exception to the rule that the appellant is entitled to begin, is where a Defendant appeals from the whole of a decree. *Roberts v. Merchant.* Page 370
2. At the hearing of a petition and counter-petition in lunacy, the one praying the confirmation of the commissioners' report, and the other simply opposing it, the counsel for the first petition is entitled to begin. *In re Princess Beristinsky.* Page 442
3. A petition to confirm the Master's report in lunacy, and a cross petition in the nature of exceptions to it coming on to be heard together. Held (overruling *In re Beristinsky*) that the counsel for the cross petition ought to begin. *In re Townsend.* Page 804

ROMAN CATHOLIC.

See CHARITY, 2.

SCHEME.

The Attorney-General ought to be a party to all inquiries before the Master, under the 52 G. 3. c. 101. (Sir S. Romilly's Act), and any proceedings taken in his absence are irregular. *Attorney-General v. Earl of Stamford.* Page 737

See CHARITY.

SECURITY FOR COSTS.

See COSTS, VI.

SENTENCE OF ECCLESIASTICAL COURT.

See NEXT OF KIN.

SERVICE (SUBSTITUTED).

If the Court can be satisfied that a Defendant who is out of the jurisdiction has given authority to a person within the jurisdiction to act for him in the suit, it will order that service of the *subpoena* to appear and answer on that person shall be good service on the Defendant, but the evidence of agency will be closely scrutinised. *Murray v. Vipart.* Page 521

SOLICITOR.

See COSTS, VI. 2

PRIVILEGED COMMUNICATIONS.

TAXATION.

SPECIFIC PERFORMANCE.

In a marriage settlement, which comprised only the property of the wife, it was agreed between the intended husband and wife, and each of them covenanted with the trustees, that any property to which the wife might become entitled during the coverture, should be conveyed to such uses as she should by deed or will appoint, and in default of appointment, to the use of herself for life, remainder to the use of the husband for his life, remainder to the use of the wife's children, and in default

fault of such children, to the use of *A. B.* (her niece) and her heirs. After the death of the wife without children, and without having exercised her power of appointment, the husband filed a bill against her heir-at-law, praying that a real estate, to which she had become entitled during her lifetime, might be conveyed to the uses of the settlement. On the question whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece (who was also dead): Held, that it should extend to the latter, on the ground that the right of the husband to a specific performance of part of the covenant draw with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done as against a purchaser for value. *Davenport v. Bishopp.*

Page 698

See PLEADING, III. 1.

STAMP.

A court of equity cannot, any more than a court of law, receive parol evidence of the contents of a written agreement, which appears never to have been stamped, even where it is proved to have been fraudulently destroyed by the party against whom it is sought to be enforced. *Smith v. Henley.*

Page 391

STATUTES.

6 *Ann. c. 51.* and 14 *G. 3. c. 78.*

Whether the protection given by the statutes 6 *Ann. c. 51.* and 14 *G. 3. c. 78.* to a party in whose house or on whose estate a fire "shall accidentally begin," extends to fires occasioned by the negligence of the owner or his servants, or whether it is confined to fires arising from pure accident in the limited sense of the word. *Viscount Canterbury v. The Attorney-General.*

Page 306

3 & 4 *W. 4. c. 27.* (*Statute of Limitations.*)

See JOURNEYS' ACCOUNTS.

TITLE.

3 & 4 *W. 4. c. 74.* (*Fines and Recoveries Act.*)

See PROTECTOR OF SETTLEMENT.

3 & 4 *W. 4. c. 42.* (*Law Amendment Act.*)

See EVIDENCE, 2, 3.

4 & 5 *W. 4. c. 29.* (*Landed Securities in Ireland.*)

See IRISH MORTGAGES.

1 & 2 *Vict. c. 110.* (*Abolition of Arrest on Mesne Process.*)

See ELEGIT.

5 *Vict. c. 5.* (*Administration of Justice.*)

See INJUNCTION, III.

5 & 6 *Vict. c. 122.* (*Bankrupt Amendment.*)

See BANKRUPT, 5.

6 & 7 *Vict. c. 73.* (*Attorneys and Solicitors.*)

See TAXATION.

STAY

STAY OF EXECUTION.

1. Where, in a suit against executors for the payment of a legacy, the amount claimed had been brought into Court and invested, and the bill was afterwards dismissed at the hearing, the Court, in granting a motion by the Plaintiffs to stay the transfer of the fund pending an appeal to the House of Lords from the decree, required from the Plaintiffs an undertaking to submit to any order the Court might thereafter make for payment of interest and costs, with liberty to the Defendants to apply for a transfer of the fund for the purpose of investment on other security, but refused to require the Plaintiffs to enter into any undertaking by way of indemnity against a possible fall in the Funds: and an objection that the Plaintiffs, who were a corporation, were incapable of giving any undertaking which would be binding on the corporate property, was overruled. *Corporation of Gloucester v. Wood.* Page 493
2. The Court will not, in general, stay proceedings in a cause pending an appeal from an interlocutory order, unless the appeal can be speedily heard: and therefore where the appeal is to the House of Lords, an application for that purpose will not be granted, except on condition that the House will allow the appeal to be advanced so as to be heard within a limited time. *Garcias v. Ricardo.* Page 498

SUBSTITUTION.

See REVOCATION.
SERVICE.

SUPERSEDEAS.

See LUNATIC, 2.

SUPPLEMENTAL BILL.

See PLEADING, II.
TRANSFER OF CAUSES.

SUPPLEMENTAL BILL OF REVIEW.

The Act of incorporation of a railway Company required that all resolutions come to at meetings of the proprietors should be entered in a book, and the entries were made evidence of the resolutions to which they referred. In a suit against the Company for the specific performance of an agreement, the Defendants were ordered to produce their books, with the usual liberty to seal up such parts as did not relate to the matters in question. The books were produced accordingly, but the pages left open furnished no evidence of the agreement. After the bill had been dismissed for want of evidence, the Plaintiffs, on an affidavit of having recently discovered that the agreement had been recognised by a resolution passed at a meeting of the proprietors, applied for leave to file a supplemental bill, in the nature of a bill of review, for the purpose of making the resolution part of their case. And the Court.

altho gh

although of opinion that the Plaintiffs might, with due diligence, have made the discovery soon enough to have availed themselves of it in the original suit, nevertheless granted the motion, on the ground that if the Defendants had entered the resolution in their books, as they ought to have done, the consequence of any want of care and attention on the part of the Plaintiffs, or their agents, would have been obviated.

Sheffield Canal Company v. Sheffield and Rotherham Railway Company. Page 484

See PLEADING, II. 2.

SUPPLEMENTAL ANSWER.

A Defendant who had by answer insisted on his discharge under an Insolvent Debtors' Act in *India* as a defence to the suit, but had stated such discharge, as to his belief, as of a date which would not entitle him to the benefit of the Act, was allowed after the cause was in the paper for hearing, to file a supplemental answer for the purpose of correcting the error in the date, and thereby bringing himself within the protection of the Act. *Fulton v. Gilmore.* Page 522

TAXATION.

Charges in a solicitor's bill for obtaining an order from a judge at chambers, for leave to enter satisfaction in the Common Pleas office

upon a bond given by his client to the Crown for malt duties, Held, not to be for "business transacted in a court of law," so as to oust the jurisdiction of the Lord Chancellor or the Master of the Rolls, to order taxation of such bill. For that purpose the business must be some proceeding either in a suit or with a view to a suit.

Whether proceedings for the purpose of entering satisfaction on a judgment with a view to the sale of an estate would come within that description, *quære.*

An order referring a solicitor's bill for taxation may be made without notice in either of the two first classes of cases provided for by 6 & 7 Vict. c. 73. s. 37. *Ex parte Gaitskell.* Page 576

See Costs.

TENANT FOR LIFE AND REMAINDERMAN.

See ANNUITY, 1, 2, 3.

CONSTRUCTION, IV. 1. 4.

TITHE.

Proof of perception of certain tithes by the successive officiating curates of a church for a period of nearly 200 years, without opposition on the part of the improper rectors, who had during the whole of that time resided in the parish: Held, sufficient evidence of title, as against the tithe payers, to support a bill for such tithes by the present minister as perpetual curate, although the Defendants insisted

insisted that such perception had been permissive only, and the documentary evidence was irreconcilable with the supposition of an endowment.

To a bill by a perpetual curate for tithes, a *modus* was held to be well pleaded as "payable to the impropriate rector or other owner for the time being of the tithes." *Oliver v. Latham*.

Page 408

TITLE.

The period for which a good title is required to be shown is still sixty years, notwithstanding the statute 3 & 4 W. 4. c. 27. *Cooper v. Emery*.

Page 388

TRANSFER OF CAUSES.

As a general rule, the transfer of a supplemental cause from one branch of the Court to another, carries with it the original cause, though not expressly mentioned in the order. *Cass v. Cass*. Page 508

TRUSTEES (OF CHARITIES).

Petitions for filling up vacancies in charity trustees require the *fiat* of the Attorney-General, but need not be served upon him. *In re the Warwick Charities*. Page 559

VENDOR AND PURCHASER.

See COVENANT FOR DEEDS.

PLEADING, III. 1.

PURCHASE MONEY.

TITLE.

VOLUNTARY SETTLEMENT.

1. *A.*, shortly before his death, sent a verbal message to *B.* his debtor, desiring him to hold the debt in trust for *C.* *B.* accepted the trust, and the transaction was communicated to *C.* both by *A.* and *B.* Held (on a bill filed by *C.* against *B.*, and the personal representative of *A.*, who had brought an action against *B.* for the recovery of the debt), that the trust, although voluntary, was binding upon *A.*'s estate; and an injunction which had been granted by the Court below, was, on that ground, upheld on appeal, the Court being of opinion that the transaction amounted to the same thing as if *A.* had declared himself, instead of *B.*, trustee of the debt for the Plaintiff. *M'Fadden v. Jenkins*. Page 153

2. A testator bequeathed a sum of money to trustees, in trust for his daughter for life, and in case she died without leaving issue, for her next of kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next of kin, by a voluntary deed assigned her expectant interest in reversion to the husband. Held, on the death of the daughter, without leaving issue, that the assignment operated only as an agreement to assign; and, consequently, that being voluntary, a Court of Equity would not enforce it. *Meek v. Kettlewell*.

Page 342

See SPECIFIC PERFORMANCE.

WAIVER

WAIVER.

1. Where a Defendant, who is in custody under process of contempt, for want of an answer, puts in his answer, the Plaintiff, by replying to the answer, waives the contempt, and entitles the Defendant to his discharge, without payment of costs. *Oldfield v. Cobbett.* Page 557
2. Acts amounting to waiver of irregularity in an attachment, though not available in answer to an application by a prisoner for his discharge, are available where the party has obtained his discharge, and where his only object in impeaching the attachment is to set aside subsequent proceedings founded upon it. *Needham v. Needham.* Page 640

WILL.

See CONSTRUCTION, IV.
JURISDICTION, IV.
REVOCATION.

Rule of Construction in.

Of two inconsistent dispositions in a will (both being intelligible), whether occurring in the same sentence or in different sentences, the last is to prevail, unless a contrary intention can be safely inferred from the context.

Discussion as to the amount of internal evidence which will justify such an inference. *Morrall v. Sutton.* Page 533

WRIT OF RIGHT.

See JOURNEY'S ACCOUNTS.
QUASHING WRIT.

LONDON
SPOTTISWOODE and SHAW,
New-street-Square.





